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VOL 3111

United States
Court of Appeals
for the Ninth Circuit

GREGORIO ARCIAGA MESINA,

Appellant,

vs.

RICHARD C. HOY, District Director of Immi-
gration and Naturalization Service,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

JUL 30 1959

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Los Angeles 12, California.

United States District Court for the Southern
District of California, Central Division

No. 998-58-PH

GREGORIO ARCIAGA MESINA,

Plaintiff,

vs.

RICHARD C. HOY, District Director of Immi-
gration and Naturalization Service, Depart-
ment of Justice,

Defendant.

COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTION

Plaintiff Respectfully Shows to This Court and
Alleges:

I.

That this action arises out of, and is based on the
Declaratory Judgment Act (28 U.S.C.A., 2201) and
Section 10 of the Administrative Procedure Act
(5 U.S.C.A., 1009).

II.

That the plaintiff is a resident of the County
of Los Angeles, State of California.

III.

That the defendant is the District Director of the
Immigration and Naturalization Service, Depart-
ment of Justice, at Los Angeles, California.

IV.

That the plaintiff was born in the Philippine Islands in 1903 and at birth was a national of the United States. He entered the continental United States in 1924, obtained a declaration of intention, No. 13624, at New Orleans, Louisiana, on May 1, 1929, and was a lawful permanent resident of the United States at the time his deportation was effectuated in 1936.

V.

That the plaintiff was the subject of deportation proceedings before the Immigration and Naturalization Service in Puerto Rico in 1935, which were based on a warrant charging that plaintiff violated the Act of 1917 in that he had been found managing a house of prostitution, and that he had been found to have received, shared in, or derived benefits from the earnings of a prostitute. That these deportation proceedings resulted in plaintiff being deported to the Philippine Islands on April 18, 1936.

VI.

That the plaintiff was employed by the United States War Department on April 10, 1946, in Manila, Philippine Islands, in the capacity of an able seaman in the Army Service Forces, Transportation Corps, Pacific Theater, with permanent duty station being San Francisco Port of Embarkation, Fort Mason, California. That such employment was continuous until December 4, 1954. That during such employment he received a letter of

commendation from his commanding officer praising his unfailing loyalty to the United States during the Korean conflict.

VII.

That while in the service as a merchant seaman, having sufficient service to be eligible for naturalization, plaintiff sent a completed application for citizenship (Form N-400) to the Immigration and Naturalization Service at San Francisco, California, and the application was not received until February 4, 1954, and the applicable provision of law under which plaintiff could have filed having expired on December 24, 1953, while plaintiff was at sea and unable to reach the continental United States, he was not eligible to file a petition for naturalization.

VIII.

That on December 31, 1956, plaintiff entered the United States at Baltimore, Maryland, as a crewman and was "authorized" to remain in the United States until February 27, 1957; that such entry could only have been authorized if plaintiff had applied to the Attorney General of the United States for admission under Section 212(a)(17), (8 U.S.C., 1182(a)(17)), and plaintiff had not done so; that plaintiff should not have been and could not have been legally authorized to enter the country under Section 101(a)(15), (8 U.S.C., 1101(a)(15)), as a nonimmigrant or otherwise because of the prior deportation.

IX.

That on June 11, 1957, the plaintiff was served with an Order to Show Cause by the Immigration and Naturalization Service, ordering plaintiff to show cause why he should not be deported from the United States on the charge that as a nonimmigrant he had remained in the United States longer than permitted (Section 241(a)(2) of the Act of 1952), (8 U.S.C., 1251(a)(2)).

X.

That on June 28, 1957, after a hearing, a Special Inquiry Officer of the Immigration and Naturalization Service ordered that plaintiff be deported from the United States on the charge contained in the Order to Show Cause; that the findings of said officer show that this plaintiff is the same person against whom a previous order of deportation was issued, that he had been previously deported as a member of the classes enumerated in Section 242(e) of the Act (8 U.S.C., 1252(e)), and that plaintiff had re-entered without applying for permission to re-apply for admission to the United States after arrest and deportation, nor did plaintiff at any time apply for or receive an immigrant visa; that the findings of the Special Inquiry Officer bring the plaintiff within the purview of Section 242(f) of the Act (8 U.S.C., 1252(f)), and consequently the Order to Show Cause should charge him with deportability only under Section 242(f) of the Act (8 C.F.R., 242.6).

XI.

That on December 12, 1957, the Board of Immigration Appeals, United States Department of Justice, ordered the outstanding order of deportation withdrawn and that proceedings be reopened to examine whether plaintiff's deportation in 1936 was pursuant to law and to determine whether plaintiff had been accorded due process.

XII.

That on January 9, 1958, at a reopened hearing, the Examining Officer, John J. Kelleher, of the Immigration and Naturalization Service, refused to charge plaintiff under Section 242(f) of the Act (8 U.S.C., 1252(f)) as requested by counsel; that the requirements of the statute (Section 242(f)) and of the regulations (8 C.F.R., 242.6) are mandatory; that the regulations specify that if deportability as charged pursuant to 8 C.F.R., 242.6 is established, the Special Inquiry Officer shall order that the previous order of deportation be reinstated and that the plaintiff be deported under said reinstated order of deportation in accordance with Section 242(f) of the Act (8 C.F.R., 242.22); that the Immigration and Naturalization Service has applied this section in the past in similar proceedings; that the refusal by the Examining Officer to lodge such a charge when requested by plaintiff's counsel was an arbitrary and capricious violation of the regulations of the Immigration and Naturalization Service.

That if the deportation order of 1936 were reinstated it could be shown that it was the result of a serious deprivation of due process in that:

1. Plaintiff being born in the Philippine Islands in 1903 was a national of the United States and not an alien when deported in 1936; and as a national of the United States he could not be deportable for acts which furnished the basis for his deportation in 1936;

2. The warrant of arrest was unlawfully issued in that there was no substantial supporting evidence on which it could be based;

3. The conduct of the hearing officer as detective, policeman, prosecutor, note-taker, interpreter, and judge resulted in a hearing inconsistent with fairness and impartiality required by the concept of due process of law;

4. Plaintiff was not allowed to cross-examine the declarants of unsigned ex parte statements introduced by the hearing officer as exhibits;

5. Months after the hearing the said hearing officer made secret representations to the Board of Review unknown to the plaintiff or to his attorney;

6. Such conduct by the hearing officer and the Board of Review in accepting the hearsay statements of the hearing officer was grossly unfair and unjust; that an indispensable condition of a fair hearing of a litigated issue was and is that the decision be governed by and be based upon the evi-

dence at the hearing, that any ex parte consideration of vital evidence without allowing plaintiff a chance to rebut them did constitute and does constitute a denial of due process of law.

That as a result of aforesaid reopened hearing of January 9, 1958, in a decision dated February 17, 1958, the Special Inquiry Officer found the plaintiff to be deportable in accordance with the deportation charge contained in the Order to Show Cause.

XIII.

That on August 7, 1958, the Board of Immigration Appeals, United States Department of Justice, affirmed the decision of the Special Inquiry Officer and dismissed the appeal of the plaintiff and concurred in the recommendations of the said officer that the plaintiff be granted voluntary departure.

XIV.

That on or about the 13th day of October, 1958, the defendant granted plaintiff nine (9) days to effect his departure from the United States at his own expense and informed plaintiff that failure to depart on or before October 22, 1958, may result in withdrawal of the privilege of voluntary departure and steps taken to effectuate deportation.

Plaintiff has reason to believe that because of his failure to depart from the United States an order of deportation will be issued.

XV.

Official records of the deportation proceedings

herein are in the custody of the defendant, Richard C. Hoy, and your petitioner prays that said records be produced and considered an exhibit herein.

XVI.

That all administrative remedies available to this plaintiff in this matter have been exhausted.

Wherefore, Plaintiff prays for the following relief together with such other and further relief which this Court may deem just and proper:

1) Plaintiff prays that a declaratory judgment be made herein vacating and declaring null and void the prior deportation order executed in April of 1936 by the Immigration and Naturalization Service and further declaring that plaintiff is a permanent resident of the United States.

2) Plaintiff prays that a permanent injunction be granted restraining and enjoining defendant from taking any steps to deport plaintiff based upon the charge under Section 241(a)(2) of the Immigration and Naturalization Act (8 U.S.C., 1251(a))—Nonimmigrant, remained longer.

/s/ GREGORIO ARCIAGA
MESINA.

/s/ NORMAN STILLER,
Attorney for Plaintiff.

[Endorsed]: Filed October 16, 1958.

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Norman Stiller, plaintiff's attorney, whose address is 995 Market Street, Room 918, San Francisco 3, California, an answer to the complaint which is herewith served upon you, within Sixty (60) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: October 16, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk of Court.

/s/ MURRELL E. THOMPSON,
Deputy Clerk.

[Endorsed]: Filed October 23, 1958.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Richard C. Hoy, District Director of the Immigration and Naturalization Service at Los Angeles, California, and in answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Defendant neither admits nor denies the allegations contained in Paragraph I of plaintiff's complaint, the same being conclusions of law.

II.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegation contained in Paragraph II and on that ground denies said allegation.

III.

Referring to the allegations contained in Paragraphs III, IX, XI, XIII, XIV, XV and XVI, of plaintiff's complaint, admits said allegations.

IV.

Referring to the allegations contained in Paragraph IV of plaintiff's complaint, admits that plaintiff was born in the Philippine Islands on or about 1903 and at birth was a national of the United States, and that he entered the continental United States in 1924. Defendant has no information or knowledge sufficient to form a belief as to the truth of the remainder of the allegations in said Paragraph IV and on that ground denies said allegations.

V.

Referring to the allegations contained in Paragraph V, admits said allegations, but alleges that the warrant of arrest which instituted such proceedings, issued June 25, 1935, charged that plaintiff had been found managing a house of prostitution, or

music or dance hall or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather.

VI.

Referring to the allegations contained in Paragraph VI, denies said allegations, and alleges that plaintiff's employment in the Department of the Navy was as follows:

Position	Vessel	From	To	Type of Service
Able Seaman	USAT LST-914	17 Jun 1946	18 Jul 1947	Foreign
Able Seaman	USAT Lock Knot	7 Aug 1947	20 Feb 1949	Foreign
Able Seaman	USAT Sgt J E Muller	21 Feb 1949	30 Jun 1950	Foreign
Able Seaman	USNS Sgt J E Muller	1 Jul 1950	12 Jun 1951	Foreign
Able Seaman	USNS Sgt J E Muller	14 Sep 1951	18 Sep 1951	Foreign
Able Seaman	USNS Sgt J E Muller	27 Nov 1951	10 Jul 1952	Foreign
Able Seaman	USNS Sgt J E Muller	15 Sep 1952	31 Mar 1953	Foreign
Able Seaman (Maint)	USNS Sgt J E Muller	1 Apr 1953	3 Jun 1953	Foreign
Carpenter	USNS Sgt J E Muller	4 Jun 1953	12 Aug 1953	Foreign
Able Seaman (Maint)	USNS Sgt J E Muller	21 Oct 1953	4 Dec 1954	Foreign

VII.

Referring to the allegations contained in Paragraphs VII, VIII and XII, denies said allegations.

VIII.

Referring to the allegations contained in Paragraph X, admits that on June 28, 1957, after a hearing, a Special Inquiry Officer of the Immigration and Naturalization Service ordered that plain-

tiff be deported from the United States on the charge contained in the Order to Show Cause; denies each and every other allegation contained in said paragraph.

IX.

Admits, as alleged in Paragraph XII, that as a result of a reopened hearing of January 9, 1958, in a decision dated February 17, 1958, the Special Inquiry Officer found the plaintiff to be deportable in accordance with the deportation charge contained in the Order to Show Cause, but denies each and every other allegation contained in said Paragraph XII.

Wherefore, defendant prays that this Court determine that the deportation order is valid and that plaintiff is deportable, and for such other and further relief as to the Court seems appropriate.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division;

ARLINE MARTIN,
Assistant U. S. Attorney;

/s/ ARLINE MARTIN,
Attorneys for Defendant.

Affidavits of Service by Mail attached.

[Endorsed]: Filed November 18, 1958.

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM

Statement of Facts

Plaintiff is a native and citizen of the Philippines, 55 years of age, who last entered the United States in 1956, as a seaman. The charge in the order to show cause is that, after entry as a non-immigrant, he remained longer and is deportable under Sec. 241(a)(2) of the 1952 Act.

The facts now of record—recorded on reopening by direction of the Board of Immigration Appeals—establish that plaintiff is identical with the Gregorio Mesina who (a) had lawfully entered the United States for permanent residence in 1931; (b) was deported to the Philippines in 1936; (c) was deported as a member of one of the classes enumerated in Sec. 242(e) of the 1952 Act; and (d) re-entered in 1956 without having been granted permission to re-apply. In accordance with the Board of Immigration Appeals' order of December 12, 1957, the complete record of the prior deportation of plaintiff was admitted in evidence as Exhibit 5 (R. 10).

Following the introduction of this evidence, counsel moved for reinstatement of the previous order of deportation in accordance with Sec. 242(f) of the 1952 Act, which was denied. Thereafter, the Special Inquiry Officer concluded that plaintiff had been previously deported in pursuance of law (that is, that plaintiff had been afforded due process of

law in that proceeding), and was deportable on the charge contained in the order to show cause (although voluntary departure was granted). The Board of Immigration Appeals' prior order directed that the case be certified back to the Board of Immigration Appeals, and the order was affirmed.

Argument

Plaintiff wishes to call the Court's attention to lines 29 to 31 on page two (2) of defendant's memorandum. In examining the exhibits offered by the Government and also the transcript of hearings held on June 19, 1957, and on January 9, 1958, we are unable to find any mention or reference to a failure on plaintiff's part to disclose that he had previously been deported. Consequently, lines 29 to 31, page two (2) should be ordered stricken from defendant's memorandum and the Court should disregard said lines and allegations contained therein.

The charge of the order to show cause shows that plaintiff entered the country lawfully and remained longer than authorized. That this charge is unsupportable on this record is manifest—plaintiff was previously deported and could only seek admission if he had applied to the Attorney General under Section 212(a)(17). Plaintiff had not applied under Section 212(a)(17) and should not have been and could not have been legally authorized to enter the country under Section 101(a)(15) as a non-immigrant or otherwise because of the prior deportation.

Hence the plaintiff cannot lawfully be deported on the sole charge made on the order to show cause.

On the present record, the only appropriate charge is under Sec. 242(f) of the 1952 Act: The decision of the Board of Immigration Appeals dated December 12, 1957, was rendered on a deficient record, in that the official record of deportation of plaintiff in 1936 was not in evidence; the Board of Immigration Appeals ordered reopening of the case for a determination as to whether plaintiff was deported in 1936 pursuant to law, and for recordation of all available official information respecting such deportation. On the present record, and on the authority of the law, the regulations and *U. S. ex rel. Blankenstein vs. Shaughnessy*, 112 F. Supp. 607, it is submitted that on this record the charge must be laid under Sec. 242(f). The Board apparently relied upon *Blankenstein, supra*, for the proposition that "there is no automatic reinstatement of the previous order of deportation," for as the Court said (at 610):

"Section 242(f) specifically provides: 'Should the Atty. General find that any alien has unlawfully re-entered the United States after having previously departed or been deported pursuant to an order of deportation * * * the previous order of deportation shall be deemed to be reinstated from its original date * * *'. Thus, the Attorney General is required to make a finding (1) that the alien whose deportation is now sought is the same person against whom

the previous order of deportation was issued; (2) that he either previously departed or had been deported as a member of the classes enumerated in Sec. 242(e) of the Act; and (3) that he had unlawfully re-entered. 8 CFR Sec. 242.75. Then, and only then, is the previous order of deportation reinstated.”

The regulations as revised January 1, 1958, provide:

“Sec. 242.6 Aliens deportable under Section 242(f) of the act. In the case of an alien within the purview of Section 242(f) of the act, the order to show cause shall charge him with deportability only under Section 242(f) of the act. The prior order of deportation and evidence of the execution thereof, properly identified, shall constitute prima facie cause for deportation under that section.”

The record as now constituted establishes all of the prerequisites of the statute, the regulations and interpretation thereof. The requirement of the statute and of the regulations is mandatory. Hence, no other charge can be made or, if made, can not lawfully be sustained.

If the 1936 deportation is re-examined many aspects of its record will show that plaintiff was deprived of due process of law.

(1) Plaintiff was not an alien in 1936: This proposition is established by the decision of the Supreme Court in *Rabang vs. Boyd*, 353 U. S. 427, holding that persons born in the Philippine Islands

and permanently resident in the United States “became aliens on July 4, 1946.” Irrespective of any technical rules, it is submitted that where a finding of alienage was made, or was assumed (as in the original warrant of arrest), contrary to law, that basic error of law robs the prior deportation of any validity.

No interpretation of the law could have held plaintiff to be an alien until the Philippine Independence Act became effective; the Act was passed by Congress in March, 1934, but was by its terms not to be effective until the Philippine people accepted it. “Formal acceptance became effective May 14, 1935.” *Del Guercio vs. Gabot*, 161 F. 2d 559. Had plaintiff been considered to be an alien as of May 14, 1935, any conduct alleged to subject him to deportation would have had to occur subsequent to May 14, 1935. Note that in the case cited by the Special Inquiry Officer—*Matter of O*, III I&N Dec. 155, at page 158 the Board refers to the alien’s misconduct as having occurred “after the effective date of the Independence Act.” There is really no evidence in the 1935 record which would even allege, much less prove, such misconduct after May 14, 1935—note, again, that the telegraphic warrant of arrest and application therefore were dated June 25, 1935, and as we shall later see, there was no evidence whatever of record at that time.

This argument was presented to the Board of Immigration Appeals but said Board made no answer to this charge or any other referring to the fact

that Plaintiff was not an alien but a national at the time the alleged acts were said to be performed.

(2) The warrant of arrest was unlawfully issued: The opinion of the Board of Immigration Appeals is erroneous in that it asserts that the warrant of arrest was based on the sworn statements of five persons—the request for the warrant came approximately six weeks before any such sworn statements.

Rule 19, Subd. B of the regulations in force in 1935 required that the warrant of arrest application

“must state facts showing *prima facie* that the alien comes within one or more of the classes subject to deportation after entry * * * and should be accompanied by some substantial supporting evidence. If the facts stated are within the personal knowledge of the inspector reporting the case, or such knowledge is based upon admissions made by the alien, they need not be in affidavit form. But if based upon statements of persons not sworn officers of the Government * * * the application should be accompanied by the affidavit of the person giving the information or by a transcript of a sworn statement taken from that person by an Inspector. * * * Telegraphic application may be resorted to only in case of necessity, or when some substantial interest of the Government would be observed thereby, and must state * * * the substance of the facts and proof contained in such application.”

These requirements were further provided for by informal instructions disseminated by the Service in Lecture No. 22, November 12, 1934, "Warrant and Deportation Procedure," whose author, W. W. Brown, was then head of the Warrant Division of the Department; the gist of the regulation is repeated, and the purpose of the foregoing requirements is indicated by the statement in his lecture that

"The applications, together with supporting evidence, are reviewed at the Central Office by officers especially qualified for that purpose and if a *prima facie* case is established, a warrant of arrest signed by the Secretary or one of the assistants is issued."

The telegraphic warrant of arrest was applied for in this case, without compliance with the lesser requirements regarding necessity or substantial interest of the Government, and without compliance with the basic requirements as to "substantial supporting evidence." In fact, the telegraphic application did not state the substance of the facts and proof which were supposed to support the regular application, evidently because the regular application was not so supported; the sole alleged basis for the application was a memorandum of Robert J. Leith, Immigrant Inspector, to the District Director, which stated:

"In re: George Messina.

"It has been reported to this office from sources considered to be reliable that a Filipino

known as George Messina is the proprietor of a house of prostitution. It is further stated in the report that Messina has four or five Porto Rican girls living in his house, where they are practicing prostitution.

“It is, therefore, respectfully suggested that a cablegraphic warrant of arrest be applied for in this case.”

The formal application for the warrant of arrest, not received by the Central Office until July 2, 1935, was as much in violation of the regulations as the telegraphic application, since neither was accompanied by substantial supporting evidence, or in fact by any evidence at all. The hearsay statement of Inspector Leith was in direct conflict with the regulation and consistent instructions—he made no effort even to take a statement from the “sources” of which he spoke, much less an affidavit or transcript of a sworn statement—it was simply rumor. It is deemed fair comment to say that, the lack of basis for the application for the warrant may have even dictated the use of cable or telegraph—to avoid the specific requirements of the regulation.

The importance of obeying the regulations with regard to the application for, and issuance of, warrants of arrest may perhaps be noted by reference to the leading case of *Whitfield vs. Hanges*, 222 Fed. 745 at page 749. Failure to adhere to the rule that the application for the warrant must be supported by substantial evidence, and an accompanying failure to show or read to the alien the

evidence upon which the warrant had been issued rendered the proceeding unfair from its inception—and rendered the hearing unfair; *Sibray vs. U. S.*, 282 Fed. 795, 796; *Ex parte Radivoeff*, 278 Fed. 227; and *Whitfield v. Hanges*, *supra*. Manifestly plaintiff could not have had notice of any evidence which was supposed to support the warrant of arrest, and concomitant opportunity to refute that evidence, because there was no scintilla of evidence to support the application and no such notice and opportunity could have been afforded. The allegation of Inspector Leith (1935 R. 3) that the *ex parte* statements Exs. A, B, C, D and E were “evidence on which the warrant of arrest is based” could not be true, since the earliest date on any such reported statement is August 6, 1935, (Ex. B), and the others are all dated later, whereas the warrant application and warrant are dated June 25, 1935.

(3) The 1935 hearing officer intermingled the functions of detective, policeman, prosecutor, note-taker, interpreter and judge:

As indicative of what were approved practices in deportation hearings in 1935, we note that in Lecture No. 1, February 12, 1934, then Commissioner D. W. MacCormack, initiating the series of lectures intended to guide the future conduct of Service personnel, stated (*inter alia*) that some of the worst criticisms of the Service had been the “failure to realize that its function is primarily judicial in nature,” “third-degree methods,” and “the practice of having the same inspector as investigator, arrest-

ing officer and trial officer.” In Lecture No. 22, November 12, 1934, W. W. Brown stated (p. 5):

“in the past, formal hearings have frequently been conducted by the same officer who conducted the preliminary hearing and investigation. At the present time, however, and wherever possible the hearing is given by some officer other than the investigating officer. When it is found that the alien is unfamiliar with the English language to the extent he is unable to comprehend the proceedings, a competent interpreter is employed at Government expense.”

In this case, Inspector Leith carried on all functions from beginning to end, with nothing of record to indicate why he was chosen to perform all of the varying and inconsistent duties. Perhaps the most damaging ex parte statement alleged to have been taken by Inspector Leith is the reported statement of one Marta R. Caraballo, which was introduced in evidence over objection (1935, R. 3). In the purported taking of this statement, Inspector Leith played the whole role alone—he was investigator, interpreter and (apparently) note-taker. The purported statement of Perez was not even signed—it could not have been, because as shown by the notes of stenographer-interpreter Ramirez, the alleged transcript was merely a transcript of “my shorthand notes regarding this sworn statement, as dictated to me by Inspector Robert J. Leith.” How it was possible for Inspector Leith to have remembered what to dictate, and whether he had the capacity of trans-

lating or interpreting from the Spanish language (used by Perez) and the English language (which he dictated to Ramirez), are but two unexplained mysteries in the picture of gross unfairness.

These facts exemplify and document how Inspector Leith initiated the charges on stated hearsay from undisclosed sources, without supporting evidence of any kind, and then endeavored to carry his charges through to the conclusion of plaintiff's deportation—sometimes the Inspector being the only person present when a witness was alleged to have made a sworn statement to him in a foreign language. Standing alone, the failure to establish of record that a "competent interpreter" was used in the proceedings constitutes the denial of a constitutional right and renders the hearing unfair; *Gonzales vs. Zurbrick*, 45 F. 2d 934 (CAA 5, 1930). Moreover, there is nothing of record to indicate why Inspector Leith was permitted to discharge his many immiscible functions to this amazing point:

During the very course of the "hearing," with the Inspector sitting as prosecutor and judge (on the morning of the last day of the hearing, September 17, 1935), the testimony of witness Burgos, called as a witness by Inspector Leith (135, R. 27) shows: That the inspector, accompanied by the person who was interpreter at the hearing, entered the house of Burgos without permission; Burgos, as the Inspector's witness, testified (R. 30) that "they lost their temper," "he (Leith) went up in the air." "he

lost his temper and threatened me if I would not come to testify" (against the plaintiff); that Inspector Leith was in full uniform and "had a pistol on his hip." The questioning of Burgos by the Inspector is replete with questions regarding "the Filipino," without any identification as to the person to whom the Inspector was referring. Witness Burgos finally asked this question of Inspector Leith:

"A. No, sir, I don't know the Filipino. I don't know anything about him. Who is the Filipino?"

Instead of answering this question, Inspector Leith did this:

"Examining Officer: No further questions."

When the case was reviewed by an examiner for the Board of Review (1935 recommendation, p. 7) the examiner completely garbled these facts:

"Burgos further testified when asked whether he said the Filipino's house was a house of prostitution, 'No, I don't know the Filipino, I don't know anything about him. Who is the Filipino?' At this point the attorney refused to continue with the case and advised his client to answer no more questions."

The egregious error of this finding is that it was Inspector Leith who closed the examination of his own witness, after having failed or refused to identify to the witness the "Filipino" about whom he had been asking questions, and it was after an

exchange of Stenographer-interpreters (caused by the fact that the Inspector had had the stenographer testify to try to impeach his own witness) that the attorney stated that he declined to permit plaintiff to be again cross-examined, since he had already been cross-examined, previously. And the attorney did not refuse to continue with the case, since he stated (R.31):

“* * * I have no more witnesses except to cross-examine a girl confined in the Insular Sanatorium.”

Inspector Leith did not even deign to acknowledge this further demand for cross-examination of the girl whose statement he had purported to take in the Sanatorium, and closed the case with the addition of the charge “Receiptor” over the objection of counsel, without giving either plaintiff or his counsel any opportunity whatever to answer or produce evidence on that charge. As stated in *U. S. v. Van de Mark*, 3 F. Supp. 101, when one man acts as “inquisitor, interpreter, prosecutor and judge”

“The trial moves rapidly on when the judge has determined the sentence beforehand.”

(4) The right of cross-examination of witnesses was refused: As pointed out above, Exhibit A in the 1935 hearing, the alleged sworn statement of one Marta Rodriguez Carabello, purporting to have been taken from her in a sanitarium, but actually dictated by Inspector Leith to a stenographer at some other time and place, and unsigned by her,

was introduced in evidence over the objections of counsel; over and over again, counsel specifically requested the right of cross-examination of all of the persons from whom the inspector took statements. Even though this woman is reported to have stated that she would be willing to appear as a witness, up to the very last few minutes of the hearing, counsel's repeated demands were ignored. Notwithstanding, the Board of Review recommendation relied upon this woman's statement, Ex. A, and the other four purported statements, as "the principal evidence in support of the charges against the alien." The Board examiner merely noted the objections of counsel as to Carabello and stated: "It appears probable that her testimony might have been taken by going to the institution for the purpose, but this was not done."

As to Josefina Ruiz (Ex. D, 1935) the refusal of the inspector to call her for cross-examination was excused by the Board examiner on the statement that "possibly because her statements were not as clear and definite in support of the warrant charges as those of the other witnesses." In other words, because the ex parte witness Ruiz had given a statement quite favorable to the plaintiff, and which did not "support the warrant charges," the inspector refused to call her as a witness at the hearing and contented himself with introducing her ex parte statement, and denying any examination of her by counsel.

The serious consideration given to at least two

ex parte statements as part of the "principal evidence" to sustain the warrant charges, against the respondent, where the makers of the statements could have been produced at the hearing, renders the hearing and decision unfair; *Ungar v. Seaman*, 4 F. 2d 80 (CCA 8, 1924); *Whitfield v. Hanges*, *supra*; *Schenck v. Ward*, 6 F. Supp. 739; *Ex parte McMahon*, 1 F. 2d 456; *Ex parte Chin Loy Yow*, 223 Fed. 833; *Gonzales v. Zurbrick*, *supra*; *Svarney v. U. S.*, 7 F. 2d 515; and *Maltez v. Nagle*, 27 F. 2d 835. It seems more than significant that the cases wherein such practices of the Service have been most severely criticized are those involving charges that the respective respondents were engaged in the managing of houses of prostitution, and the "evidence" relied upon consisted of statements of members of that oldest profession in the world—as in *Whitfield* and *Svarney*, *supra*.

(5) The inspector made secret representations which influenced the Board of Review: Months after the hearing was completed, the record was forwarded by the District Director at San Juan to the Commissioner (January 2, 1936). Contrary to the practice prescribed in Lecture 22, the District Director himself made no recommendation to the Commissioner; this was error, of course. The only recommendation was made by Inspector Leith, who recommended plaintiff's deportation. To this, the Inspector appended a pageful of statements headed up

“Comments by Inspector Leith”

These comments consisted in attacks upon the testimony of eight witnesses, whose testimony in open hearing was favorable to the plaintiff. As an example, the Inspector attacked the testimony of witness Jenaro de Jesus by stating that this witness had not reported to the authorities an alleged house of prostitution next door to Mesina's house.

The record shows that witness de Jesus was not asked if he knew that there was a house of prostitution further down the street or in the vicinity and he was not asked as to whether, if he knew of the existence of such a place, he had or had not reported it to the authorities. Additionally, there is no evidence of record that he had not made such a report. The inspector went on to suggest and request that the testimony of each and every witness favorable to plaintiff “be not considered” in his (plaintiff's) behalf and favor.

The allegations of Inspector Leith in his “comments” were not known to plaintiff or his counsel, who had no notice of them and no opportunity to rebut them. Notwithstanding, turning to page 4 of the Board of Review recommendation, we find that the Board examiner adopting in toto the unfounded and unsupported statement regarding witness de Jesus, and, in fact, adopting virtually completely all of the “comments” of Inspector Leith.

The case of *Ungar v. Seaman*, *supra*, is relied upon by the Special Inquiry Officer in this case

as the leading case on matters related to fairness of hearing; in that case the Circuit Court of Appeals (4 F. 2d at pages 84 and 85) said:

“The introduction and receipt by the assistant Secretary of Labor, after the hearing was closed, without notice to or knowledge of the accused, of the hearsay statements of the immigration inspector * * * was grossly unfair and unjust. * * * Its receipt and consideration violated the indispensable condition of a fair hearing of a litigated issue that the case shall be decided on the evidence at the hearing, when parties or their counsel were present and that neither party nor court or quasi-judicial tribunal shall subsequently receive evidence without notice to the party to be affected or their counsel and time and opportunity to rebut it.”

Conclusion

In view of the foregoing, it is respectfully requested that the Court make a declaratory judgment vacating and declaring null and void the prior deportation order executed in April of 1936 by the Immigration and Naturalization Service and further declaring that plaintiff is a permanent resident of the United States; and, further that the Court grant a permanent injunction restraining and enjoining defendant from taking any steps to deport plaintiff based upon the charge under Section 241 (a)(2) of the Immigration and Naturalization Act

(8 U.S.C., 1251(a))—Nonimmigrant, remained longer.

/s/ NORMAN STILLER,
Attorney for Plaintiff.

[Endorsed]: Filed December 31, 1958.

[Title of District Court and Cause.]

MEMORANDUM

This is a proceeding for declaratory relief and injunction by the plaintiff under 28 U.S.C.A., 2201 and 5 U.S.C.A., 1009.

The case was set for trial and was tried on January 6th, 1959.

Plaintiff was born in the Philippine Islands in 1903; he first entered the United States in 1924; he was ordered deported, and was deported in April, 1936, on the ground that he had been managing a house of prostitution, and had been found to have received and derived benefits from the earnings of a prostitute.

On December 31, 1956, plaintiff entered the United States as a crewman, receiving a Crewman's Landing Permit (State Dept. Symbol D-2), and was required to depart from the United States before the expiration of twenty-nine (29) days. [8 U.S.C.A., 1282(a) (2)]. At that time he was a non-immigrant alien under 8 U.S.C.A., 1101(a) (15)

(D). This permit appears to have been extended to February 27, 1957.

Plaintiff did not depart, and proceedings were commenced against him in the Immigration & Naturalization Department, which finally resulted in an Order as follows:

“Order

“It is ordered that the respondent be granted voluntary departure at his own expense in lieu of deportation within such period of time and under such conditions as the District Director shall direct.

“It Is Further Ordered that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings, and the respondent be deported from the United States in the manner provided by law on the charge contained in the Order to Show Cause.”

An appeal was taken and the Order was affirmed by the Board of Immigration Appeals on August 7, 1958. This suit followed.

Plaintiff's principal contention is that the proceedings were had under Section 241(a)(2) of the Immigration & Naturalization Act of 1952—8 U.S.C.A., 1251(a)(2)—rather than Section 242(f) of the Immigration & Naturalization Act of 1952—

8 U.S.C.A., 1252(f)—which latter section permits the Attorney General to reinstate a previous order of deportation.

Plaintiff contends that it is mandatory that the proceedings be commenced under 8 U.S.C.A., 1252 (f), and that being so, the original proceedings of deportation may be attacked on the various grounds of illegality set forth in the Petition, which are not necessary to note at this point.

There is nothing to plaintiff's point that the proceedings for his deportation must be had under 8 U.S.C.A., 1252(f). *Blankenstein v. Shaughnessy*, (D.C., S.D., N.Y., 1953) 112 F. Supp. 607. And see *Souza v. Barber*, No. 15913, United States Court of Appeals, Ninth Circuit, January 30, 1959, as yet unreported, which holds that 8 U.S.C.A., 1252 (f) is a procedural section only.

Plaintiff was a non-immigrant alien under the terms of 8 U.S.C.A., 1101(a)(15)(D). He was admitted under 8 U.S.C.A., 1282(a)(2), and was properly deportable by the Attorney General by proceedings under either 8 U.S.C.A., 1251(a)(2) or 8 U.S.C.A., 1252(f), as the Attorney General in the exercise of his discretion may choose.

Petitioner cannot compel the Attorney General to exercise his discretion at the choice of the petitioner.

Counsel will prepare Findings of Fact and Conclusions of Law in accordance with this Memorandum.

Dated: Los Angeles, California, this 19th day of February, 1959.

/s/ PEIRSON M. HALL,
United States District Judge.

[Endorsed]: Filed February 19, 1959.

[Title of District Court and Cause.]

MINUTES OF THE COURT—JAN. 6, 1959

Present: Hon. Peirson M. Hall, District Judge.

Proceedings: For trial. Court orders trial proceed.

Plaintiff's Exhibit 1 is marked for identification and admitted in evidence.

Plaintiff rests.

Plaintiff's Exhibits A-1 and A-2 are marked for identification. Plaintiff objects. Counsel argue. Court orders Exhibit A-1 admitted in evidence, but denies permission to enter Ex. A-2 in evidence.

Government rests.

Court hears argument of counsel and orders cause submitted for final determination.

JOHN A. CHILDRESS,
Clerk;

By /s/ S. W. STACEY,
Deputy Clerk.

United States District Court, Southern District
of California, Office of the Clerk

Entry of Judgment

Norman Stiller, Esq.,
995 Market St.,
San Francisco 3, Calif.

Laughlin E. Waters, Esq.,
600 Federal Bldg.,
Los Angeles 12, Calif.

Re: Mesina vs. Hoy, etc., No. 998-58-PH.

You are hereby notified that judgment in the
above-entitled case was entered this day March 4,
1959, in the docket.

I hereby certify that this notice was mailed on
March 4, 1959.

CLERK, U. S. DISTRICT
COURT,

By /s/ C. A. SIMMONS,
Deputy Clerk.

United States District Court for the Southern
District of California, Central Division

Civil No. 998-58-PH

GREGORIO ARCIAGA MESINA,

Plaintiff,

vs.

RICHARD C. HOY, District Director of Immi-
gration and Naturalization Service, Department
of Justice,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND JUDGMENT

The above matter having come on for trial on January 6, 1959, before the Honorable Peirson M. Hall, plaintiff appearing by Norman Stiller, and defendant being represented by Laughlin E. Waters, United States Attorney, Richard A. Lavine and Arline Martin, Assistants United States Attorney, and the certified copy of the Immigration and Naturalization hearing having been introduced in evidence as Defendant's Exhibit 1, and the record of plaintiff's last entry having been introduced in evidence as Government's Exhibit A(1), and the matter having been argued orally and upon written memoranda, and having been submitted to the Court for decision, and the Court being fully advised makes the following Findings of Fact, Conclusions of Law, and Judgment:

Findings of Fact

I.

Jurisdiction is invoked for declaratory judgment under the Declaratory Judgment Act for injunctive relief and for judicial review of a final order of deportation under 28 U.S.C.A., § 2201 and Title 5, U.S.C., § 1009, et seq., the Administrative Procedures Act.

II.

The plaintiff is a resident of the County of Los Angeles, California.

III.

The defendant is the District Director of the Immigration and Naturalization Service, Department of Justice, at Los Angeles, California.

IV.

Plaintiff was born in the Philippine Islands in 1903. He first entered the United States in 1924, and was deported to the Philippine Islands on April 18, 1936, on the ground that he had been managing a house of prostitution and had been found to have received and derived benefits from the earnings of a prostitute.

On December 31, 1956, plaintiff entered the United States at Baltimore, Maryland, as a crewman, receiving a Crewman's Landing Permit (State Department Symbol D-2), and was required to depart from the United States before the expiration of 29 days, pursuant to Title 8, U. S. Code, § 1282 (a)(2). At that time plaintiff entered as a non-

immigrant alien under Section 8, U. S. Code, § 1101(a)(15)(D), and said permit was extended to February 27, 1957.

Plaintiff did not depart at or prior to the date indicated on his Crewman's Landing Permit and proceedings were commenced by the Immigration and Naturalization Service which resulted in an order as follows:

“Order

“It is ordered that the respondent be granted voluntary departure at his own expense in lieu of deportation within such period of time and under such conditions as the District Director shall direct.

“It Is Further Ordered that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings, and the respondent be deported from the United States in the manner provided by law on the charge contained in the Order to Show Cause.”

An appeal was taken from said order and the Board of Immigration Appeals confirmed said order on August 7, 1958, and plaintiff was ordered deported on the grounds that as a non-immigrant he had remained in the United States longer than permitted, in violation of Section 241(a)(2) of the Act of 1952 [8 U.S.C., 1251(a)(2)].

On or about the 13th day of October, 1958, the defendant granted plaintiff nine days to effect his departure from the United States at his own ex-

pense and informed plaintiff that failure to depart on or before October 22, 1958, would result in withdrawal of the privilege of voluntary departure and steps would be taken to effectuate deportation.

V.

All administrative remedies available to the plaintiff have been exhausted

VI.

evidence in the Administrative Record, which was

There is reasonable, substantial and probative reviewed herein, to sustain the findings of the Immigration and Naturalization Service and the order of deportation.

Conclusions of Law

I.

Plaintiff was accorded due process in all the proceedings by the Immigration and Naturalization Service and its findings and order of deportation are supported by reasonable, substantial and probative evidence, and were according to law and are affirmed.

II.

There was no error of law in the institution of the proceedings by the Immigration and Naturalization Service to deport plaintiff under Section 241(a)(2) of the Immigration and Nationality Act of 1952 [8 U.S.C., 1251(a)(2)] rather than Section 242(f) of the Immigration and Nationality Act of 1952 [8 U.S.C., 1251(f)], as the Attorney General,

in the exercise of his discretion, may choose which grounds, if any there are, upon which to base deportation, and it is not mandatory that the proceedings as to this plaintiff be commenced under Title 8 U.S.C., 1252(f) for the reason that Title 8 U.S.C., 1252(f) is a procedural section only. *Blankenstein v. Shaughnessy*, (D.C., S.C., N.Y., 1953), 112 F. Supp. 607, and *Souza v. Barber*, No. 15913, C.A. 9, January 30, 1959, F. 2d

III.

The final order of deportation as to the plaintiff should be affirmed, the injunctive relief denied, and judgment entered accordingly.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed that the final order of deportation of the plaintiff herein by the Immigration and Naturalization Service is a valid order and the injunction and other relief prayed for by the plaintiff is hereby denied, with costs to the defendant in the sum of \$20.00 as and for a docket fee, pursuant to 28 U.S.C., 1923.

Dated: March 3, 1959.

/s/ PEIRSON M. HALL,

United States District Judge.

Affidavit of Service by Mail attached.

Lodged February 26, 1959.

[Endorsed]: Filed and entered March 4, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court, and to Richard C. Hoy, District Director of Immigration and Naturalization Service, Department of Justice, and to Laughlin E. Waters, United States Attorney, Richard A. Lavine, Assistant U. S. Attorney, and Arlene Martin, Assistant U. S. Attorney:

You and Each of You will please take notice, and notice is hereby given that Gregorio Arciaga Mesina, the plaintiff in the above-entitled matter, hereby appeals to the Honorable United States Court of Appeals, in and for the Ninth Judicial Circuit, from the Findings of Fact, Conclusions of Law and Judgment therein rendered on the 26th day of February, 1959, by the Honorable United States District Court for the Southern District of California, Central Division, said Findings of Fact, Conclusions of Law and Judgment having been entered on the 4th day of March, 1959, denying plaintiff's complaint for declaratory judgment and injunction enjoining defendant from deporting plaintiff.

/s/ NORMAN STILLER.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 4, 1959.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated that the exhibits in evidence, i.e., the certified copy of the immigration file of appellant, are to be transmitted to and considered by the Court of Appeals in its original form.

Dated: March 31, 1959.

LAUGHLIN E. WATERS,
United States Attorney;

/s/ ARLINE MARTIN,
Assistant U. S. Attorney.

/s/ NORMAN STILLER,
Attorney for Appellant.

[Endorsed]: Filed April 1, 1959.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

A.

Complaint, filed 10/16/58.

Summons, issued 10/16/58.

Answer, filed 11/18/58.

Defendant's Memorandum, filed 11/28/58.

Plaintiff's Memorandum (Statement of Facts),
filed 12/31/58.

Memorandum of the Court, filed 2/19/59.

Minute Order of 1/6/59, re trial.

(Copy) Clerk's notice of entry of judgment,
entered 3/4/59.

Findings of Fact, Conclusions of Law and Judgment,
filed and entered 3/4/59.

Notice of Appeal, filed 3/4/59.

Designation of Record on appeal, filed 4/1/59.

Stipulation re transmittal original exhibits to
Court of Appeals, filed 4/1/59.

B.

Plaintiff's Exhibits 1 and "A."

Dated: April 17, 1959.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16448. United States Court of Appeals for the Ninth Circuit. Gregorio Arciaga Mesina, Appellant, vs. Richard C. Hoy, District Director of Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: April 20, 1959.

Docketed: April 28, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16448

GREGORIO ARCIAGA MESINA,
Appellant,

vs.

RICHARD C. HOY, Etc.,
Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF THE RECORD

The appellant makes the following statement of points on appeal:

1. That the District Court erred in finding that appellant entered as a non-immigrant alien under Section 8, U.S. Code 1101(a)(15)D, when in fact appellant could not have been legally authorized to enter the United States under Section 8, U.S. Code 1101(a)(15)D, without prior permission of the Attorney General under Section 1182A(17), 8 U.S. Code.

2. That the District Court erred in finding that appellant was accorded due process in all the proceedings by the Immigration and Naturalization Service in that the deportation order of 1936 was a serious deprivation of due process in the following respects:

a) Appellant, being born in the Philippine Islands in 1903, was a national of the United States and not an alien when deported in 1936; and as a national of the United States he could not be deportable for acts which furnished the basis for his deportation in 1936;

b) The warrant of arrest was unlawfully issued in that there was no substantial supporting evidence on which it could be based;

c) The conduct of the hearing officer as detective, policeman, prosecutor, note-taker, interpreter, and judge resulted in a hearing inconsistent with fairness and impartiality required by the concept of due process of law;

d) Appellant was not allowed to cross-examine the declarants of unsigned ex parte statements introduced by the hearing officer as exhibits;

e) Months after the hearing the said hearing officer made secret representations to the Board of Review unknown to the appellant or his attorney.

f) Such conduct by the hearing officer and the Board of Review in accepting the hearsay statements of the hearing officer was grossly unfair and unjust; that an indispensable condition of a fair hearing of a litigated issue was and is that the decision be governed by and be based upon the evidence at the hearing, that any ex parte consideration of vital evidence without allowing plain-

tiff a chance to rebut them did constitute and does constitute a denial of due process of law.

3. That the District Court erred in ruling that it is not mandatory that proceedings as to this plaintiff be commenced under Title 8, U.S.C., 1252(f).

The entire record with the exception of Defendant's Memorandum, filed 11/28/58, and Plaintiff's Memorandum (Statement of Facts), filed 12/31/58, is designated to be printed.

Dated: May 19, 1959.

/s/ NORMAN STILLER,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 19, 1959.

No. 16,448

United States Court of Appeals
For the Ninth Circuit

GREGORIO ARCIAGA MESINA,
Appellant,

VS.

RICHARD C. HOY, Director of Immigration
and Naturalization,
Appellee.

Appeal from the United States District Court for the
Southern District of California,
Central Division.

APPELLANT'S OPENING BRIEF.

NORMAN STILLER,
995 Market Street,
San Francisco 3, California,
Attorney for Appellant.

Table of Authorities Cited

Cases	Pages
Del Guercio v. Gabot, 161 F. 2d 559	6
Ex parte Chin Loy Yow, 223 Fed. 833	16
Ex parte McMahon, 1 F. 2d 456	16
Ex parte Radiyoeff, 278 Fed. 227	10
Gonzales v. Zurbrick, 45 F. 2d 934 (C.C.A. 5, 1930)	12, 16
Maltez v. Nagle, 27 F. 2d 835	16
Matter of O, III I.&N., Dec. 155	6
Rabang v. Boyd, 353 U.S. 427	6
Schenek v. Ward, 6 F. Supp. 739	16
Sibray v. U. S., 282 Fed. 795	10
Svarney v. U. S., 7 F. 2d 515	16
Ungar v. Seaman, 4 F. 2d 80 (C.C.A. 8, 1924)	16, 17
U. S. v. Bakouros, 160 F. Supp. 173 (E.D. Pa. 1958)	2
U. S. v. Van de Mark, 3 F. Supp. 101	14
U. S. ex rel. Blankenstein v. Shaughnessy, 112 F. Supp. 607	3
Whitfield v. Hanges, 222 Fed. 745	9, 10, 16

Statutes

Immigration and Naturalization Act of 1952:	
Section 101(a)(15) (8 U.S.C. 1101(a)(15))	2
Section 212(a)(17) (8 U.S.C. 1182(a)(17))	3
Section 241(a)(2) (8 U.S.C. 1251(a)(2))	2
Section 242(e) (8 U.S.C. 1252(e))	3
Section 242(f) (8 U.S.C. 1252(f))	3
5 U.S.C.A. 1009	1
28 U.S.C.A. 2201	1

Miscellaneous	Pages
Gordon and Rosenfield, Immigration Law and Procedure, Section No. 2.33, pages 220-222	2
Lecture No. 1, February 12, 1934, Commissioner D. W. Mac- Cormack, Approved Practices in Deportation Hearings in 1935	10
Lecture No. 22, November 12, 1934, Warrant and Deporta- tion Procedure, W. W. Brown	8, 11, 12
Rules of Board of Immigration Appeals, Rule 19, subdivi- sion B	7

United States Court of Appeals For the Ninth Circuit

GREGORIO ARCIAGA MESINA,

Appellant,

VS.

RICHARD C. HOY, Director of Immigration
and Naturalization,

Appellee.

Appeal from the United States District Court for the
Southern District of California,
Central Division.

APPELLANT'S OPENING BRIEF.

JURISDICTION.

This is an appeal from a decision of the District Court denying declaratory and injunctive relief as to appellant under 28 U.S.C.A. 2201 and 5 U.S.C.A. 1009.

Appellant Mesina was born in the Philippines in 1903 and at birth was a national of the United States. He first entered the United States in 1924 and lived continuously either in continental United States or Puerto Rico from 1924 until 1936. Mesina obtained a declaration of intention No. 13624 at New Orleans, Louisiana on May 11, 1929 and was a lawful perma-

ment resident of the United States in 1936 when he was deported to the Philippines on the charge of managing a house of prostitution. Subsequent to his deportation he was employed by the Department of the Navy of the United States from 1946 until 1954.

The Court below in its findings of fact found that plaintiff had been ordered deported on the grounds that as a non-immigrant he had remained in the United States longer than permitted, in violation of Section 241(a)(2) of the Act of 1952 (8 U.S.C. 1251(a)(2)), and sustained the Immigration and Naturalization Service in such order. The charge of the order to show cause shows that the appellant entered the country lawfully and remained longer than authorized. That this charge is unsupportable on this record is manifest. Mr. Mesina was previously deported and could only seek admission to the United States if he had applied to the Attorney General under Section 212(a)(17) (8 U.S.C. 1182(a)(17)). He had not applied for such permission and could not have been legally authorized to enter the country under Section 101(a)(15) (8 U.S.C. 1101(a)(15)) as a non-immigrant or otherwise because of the prior deportation. It has been held that a landing crew permit such as that obtained by appellant without knowledge of the prior deportation, does not constitute a consent to reapply. See *U. S. v. Bakouros*, 160 F. Supp. 173 (E.D. Pa. 1958). See also *Immigration Law and Procedure*, by Gordon and Rosenfield, Section No. 2.33, pages 220-222. Hence the appellant cannot lawfully be deported on the sole charge made on the order to show cause.

The facts now of record—recorded on reopening by direction of the Board of Immigration Appeals—establish that plaintiff is identical with the Gregorio Mesina who (a) had lawfully entered the United States for permanent residence in 1931; (b) was deported to the Philippines in 1936; (c) was deported as a member of one of the classes enumerated in Sec. 242(e) of the 1952 Act (8 U.S.C. 1252(e)); and (d) re-entered in 1956 without having been granted permission to reapply. In accordance with the Board of Immigration Appeals' order of December 12, 1957, the complete record of the prior deportation of plaintiff was admitted in evidence as Exhibit 5 (R. 10).

On the present record, the only appropriate charge is under Sec. 242(f) of the 1952 Act (8 U.S.C. 1252(f)): The decision of the Board of Immigration Appeals dated December 12, 1957, was rendered on a deficient record, in that the official record of deportation of plaintiff in 1936 was not in evidence; the Board of Immigration Appeals ordered reopening of the case for a determination as to whether plaintiff was deported in 1936 pursuant to law, and for recordation of all available official information respecting such deportation. On the present record, and on the authority of the law, the regulations and *U. S. ex rel. Blankenstein v. Shaughnessy*, 112 F. Supp. 607, it is submitted that on this record the charge must be laid under Sec. 242(f) of the 1952 Act (8 U.S.C. 1252(f)). The Board apparently relied upon *Blankenstein*, supra, for the proposition that "there is no automatic

reinstatement of the previous order of deportation," for as the Court said (at 610):

"Section 242(f) (8 U.S.C. 1252(f)) specifically provides: 'Should the Atty. General find that any alien has unlawfully re-entered the United States after having previously departed or been deported pursuant to an order of deportation * * * the previous order of deportation shall be deemed to be reinstated from its original date * * *' Thus, the Attorney General is required to make a finding (1) that the alien whose deportation is now sought is the same person against whom the previous order of deportation was issued; (2) that he either previously departed or had been deported as a member of the classes enumerated in Sec. 242(e) of the Immigration and Nationality Act (8 U.S.C. 1252(e)); and (3) that he had unlawfully re-entered. 8 CFR Sec. 242.75. Then, and only then, is the previous order of deportation reinstated."

The regulations as revised January 1, 1958, provide:

"Sec. 242.6. Aliens deportable under Section 242(f) of the act (8 U.S.C. 1252(f)). In the case of an alien within the purview of Section 242(f) of the act, the order to show cause shall charge him with deportability only under Section 242(f) of the act. The prior order of deportation and evidence of the execution thereof, properly identified, shall constitute prima facie cause for deportation under that section."

The record as now constituted establishes all of the prerequisites of the statute, the regulations and in-

terpretation thereof. The requirement of the statute and of the regulations is mandatory. Hence, no other charge can be made or, if made, can not lawfully be sustained.

We respectfully call to the attention of this Court that, as part of the conclusions of law by the District Court, it is stated in paragraph I that plaintiff was accorded *due process in all the proceedings* by the Immigration and Naturalization Service (italics supplied). It is our purpose and, as part of this brief, we intend to show that not only was Mr. Mesina not accorded due process but that there was a basic disregard of due process in the following respects:

1. The warrant of arrest leading to the original deportation was unlawfully issued.

2. The conduct of the hearing officer as a detective, policeman, prosecutor, notetaker, interpreter and judge was, in 1935-1936, and is today, in violation of our basic concepts of due process.

3. Appellant was not accorded the right to cross-examine declarants of unsigned ex-parte statements introduced into evidence in violation of due process.

4. Hearing officer months after the hearing made secret representations to the Board of Review unknown to the appellant or to his attorney.

In addition to the above, one other aspect of the record merits most serious consideration, that is, the status of appellant in 1935-1936.

Plaintiff was not an alien in 1935 and 1936. This proposition is established by the decision of the Supreme Court in *Rabang v. Boyd*, 353 U.S. 427, holding that persons born in the Philippine Islands and permanently resident in the United States “became aliens on July 4, 1946.” Irrespective of any technical rules, it is submitted that where a finding of alienage was made, or was assumed (as in the original warrant of arrest), contrary to law, that basic error of law robs the prior deportation of any validity.

No interpretation of the law could have held plaintiff to be an alien until the Philippine Independence Act became effective; the Act was passed by Congress in March, 1934, but was by its terms not to be effective until the Philippine people accepted it. “Formal acceptance became effective May 14, 1935.” *Del Guercio v. Gabot*, 161 F. 2d 559. Had plaintiff been considered to be an alien as of May 14, 1935, any conduct alleged to subject him to deportation would have had to occur subsequent to May 14, 1935. Note that in the case cited by the Special Inquiry Officer—Matter of O, III I&N Dec. 155, at page 158 the Board refers to the alien’s misconduct as having occurred “after the effective date of the Independence Act.” There is really no evidence in the 1935 record which would even allege, much less prove, such misconduct after May 14, 1935—note, again, that the telegraphic warrant of arrest and application were dated June 25, 1935, and as we shall later see, there was no evidence whatever of record at that time.

This argument was presented to the Board of Immigration Appeals but said Board made no answer to this charge or any other referring to the fact that plaintiff was not an alien but a national at the time the alleged acts were said to be performed.

In respect to the other denials of due process we next wish to consider the warrant of arrest which furnished the basis upon which the deportation hearing was held.

The warrant of arrest was unlawfully issued: The opinion of the Board of Immigration Appeals is erroneous in that it asserts that the warrant of arrest was based on the sworn statements of five persons—the request for the warrant came approximately six weeks before any such sworn statements.

Rule 19, Subd. B of the regulations in force in 1935 required that the warrant of arrest application

“must state facts showing *prima facie* that the alien comes within one or more of the classes subject to deportation after entry * * * and should be accompanied by some substantial supporting evidence. If the facts stated are within the personal knowledge of the inspector reporting the case, or such knowledge is based upon admissions made by the alien, they need not be in affidavit form. But if based upon statements of persons not sworn officers of the Government * * * the application should be accompanied by the affidavit of the person giving the information or by a transcript of a sworn statement taken from that person by an Inspector. * * * Telegraphic application may be resorted to only in case of necessity,

or when some substantial interest of the Government would be observed thereby, and must state * * * the substance of the facts and proof contained in such application."

These requirements were further provided for by informal instructions disseminated by the Service in Lecture No. 22, November 12, 1934, "Warrant and Deportation Procedure," whose author, W. W. Brown, was then head of the Warrant Division of the Department; the gist of the regulation is repeated, and the purpose of the foregoing requirements is indicated by the statement in his lecture that

"The applications, together with supporting evidence, are reviewed at the Central Office by officers especially qualified for that purpose and if a *prima facie* case is established, a warrant of arrest signed by the Secretary or one of the assistants is issued."

The telegraphic warrant of arrest was applied for in this case, without compliance with the lesser requirements regarding the necessity or substantial interest of the Government, and without compliance with the basic requirements as to "substantial supporting evidence". In fact, the telegraphic application did not state the substance of the facts and proof which were supposed to support the regular application, evidently because the regular application was not so supported; the sole alleged basis for the application was a memorandum of Robert J. Leith, Immigrant Inspector, to the District Director, which stated:

“In re: George Messina.

It has been reported to this office from sources considered to be reliable that a Filipino known as George Messina is the proprietor of a house of prostitution. It is further stated in the report that Messina has four or five Porto Rican girls living in his house, where they are practicing prostitution.

It is, therefore, respectfully suggested that a cablegraphic warrant of arrest be applied for in this case.”

The formal application for the warrant of arrest, not received by the Central Office until July 2, 1935, was as much in violation of the regulations as the telegraphic application, since neither was accompanied by substantial supporting evidence, or in fact by any evidence at all. The hearsay statement of Inspector Leith was in direct conflict with the regulation and consistent instructions—he made no effort even to take a statement from the “sources” of which he spoke, much less an affidavit or transcript of a sworn statement—it was simply rumor. It is deemed fair comment to say that, the lack of basis for the application for the warrant may have even dictated the use of cable or telegraph—to avoid the specific requirements of the regulation.

The importance of obeying the regulations with regard to the application for, and issuance of, warrants of arrest may perhaps be noted by reference to the leading case of *Whitfield v. Hanges*, 222 Fed. 745 at page 749. Failure to adhere to the rule that the application for the warrant must be supported by

substantial evidence, and an accompanying failure to show or read to the alien the evidence upon which the warrant had been issued rendered the proceeding unfair from its inception—and rendered the hearing unfair; *Sibray v. U. S.*, 282 Fed. 795, 796; *Ex parte Radivoeff*, 278 Fed. 227; and *Whitfield v. Hanges*, supra. Manifestly plaintiff could not have had notice of any evidence which was supposed to support the warrant of arrest, and concomitant opportunity to refute that evidence, because there was no scintilla of evidence to support the application and no such notice and opportunity could have been afforded. The allegation of Inspector Leith (1935 R. 3) that the ex parte statements Exhibits A, B, C, D and E were “evidence on which the warrant of arrest is based” could not be true, since the earliest date on any such reported statement is August 6, 1935, (Ex. B), and the others are all dated later, whereas the warrant application and warrant are dated June 25, 1935.

The next point to be considered is the conduct of the hearing officer.

The 1935 hearing officer intermingled the functions of detective, policeman, prosecutor, notetaker, interpreter and judge.

As indicative of what were approved practices in deportation hearings in 1935, we note that in Lecture No. 1, February 12, 1934, then Commissioner D. W. MacCormack, initiating the series of lectures intended to guide the future conduct of Service personnel, stated (inter alia) that some of the worst criticisms

of the Service had been the "failure to realize that its function is primarily judicial in nature," "third-degree methods," and "the practice of having the same inspector as investigator, arresting officer and trial officer." In Lecture No. 22, November 12, 1934, W. W. Brown stated (p. 5):

"in the past, formal hearings have frequently been conducted by the same officer who conducted the preliminary hearing and investigation. At the present time, however, and wherever possible the hearing is given by some officer other than the investigating officer. When it is found that the alien is unfamiliar with the English language to the extent he is unable to comprehend the proceedings, a competent interpreter is employed at Government expense."

In this case, Inspector Leith carried on all functions from beginning to end, with nothing of record to indicate why he was chosen to perform all of the varying and inconsistent duties. Perhaps the most damaging *ex parte* statement alleged to have been taken by Inspector Leith is the reported statement of one Marta R. Caraballo, which was introduced in evidence over objection (1935, R. 3). In the purported taking of this statement, Inspector Leith played the whole role alone—he was investigator, interpreter and (apparently) note-taker. The purported statement of Perez was not even signed—it could not have been, because as shown by the notes of stenographer-interpreter Ramirez, the alleged transcript was merely a transcript of "my shorthand notes regarding this sworn statement, as dictated to me by

Inspector Robert J. Leith.” How it was possible for Inspector Leith to have remembered what to dictate, and whether he had the capacity of translating or interpreting from the Spanish language (used by Perez) and the English language (which he dictated to Ramirez), are but two unexplained mysteries in the picture of gross unfairness.

These facts exemplify and document how Inspector Leith initiated the charges on stated hearsay from undisclosed sources, without supporting evidence of any kind, and then endeavored to carry his charges through to the conclusion of plaintiff's deportation—sometimes the Inspector being the only person present when a witness was alleged to have made a sworn statement to him in a foreign language. Standing alone, the failure to establish of record that a “competent interpreter” was used in the proceedings constitutes the denial of a constitutional right and renders the hearing unfair; *Gonzales v. Zurbrick*, 45 F. 2d 934 (C.C.A. 5, 1930). Moreover, there is nothing of record to indicate why Inspector Leith was permitted to discharge his many immiscible functions to this amazing point.

During the very course of the “hearing”, with the Inspector sitting as prosecutor and judge (on the morning of the last day of the hearing, September 17, 1935), the testimony of witness Burgos, called as a witness by Inspector Leith (1935, R. 27) shows: That the inspector, accompanied by the person who was interpreter at the hearing, entered the house of Burgos without permission; Burgos, as the Inspec-

tor's witness, testified (R. 30) that "they lost their temper," "he (Leith) went up in the air," "he lost his temper and threatened me if I would not come to testify" (against the plaintiff); that Inspector Leith was in full uniform and "had a pistol on his hip." The questioning of Burgos by the Inspector is replete with questions regarding "the Filipino", without any identification as to the person to whom the Inspector was referring. Witness Burgos finally asked this question of Inspector Leith:

"A. No, sir, I don't know the Filipino. I don't know anything about him. Who is the Filipino?"

Instead of answering this question, Inspector Leith did this:

"Examining Officer: No further questions."

When the case was reviewed by an examiner for the Board of Review (1935 recommendation, p. 7) the examiner completely garbled these facts:

"Burgos further testified when asked whether he said the Filipino's house was a house of prostitution, 'No, I don't know the Filipino, I don't know anything about him. Who is the Filipino?' At this point the attorney refused to continue with the case and advised his client to answer no more questions."

The egregious error of this finding is that it was Inspector Leith who closed the examination of his own witness, after having failed or refused to identify to the witness the "Filipino" about whom he

had been asking questions, and it was after an exchange of stenographer-interpreters (caused by the fact that the Inspector had had the stenographer testify to try to impeach his own witness) that the attorney stated that he declined to permit plaintiff to be again cross-examined, since he had already been cross-examined, previously. And the attorney did not refuse to continue with the case, since he stated (R. 31):

“* * * I have no more witnesses except to cross-examine a girl confined in the Insular Sanatorium.”

Inspector Leith did not even deign to acknowledge this further demand for cross-examination of the girl whose statement he had purported to take in the Sanatorium, and closed the case with the addition of the charge “Receiptor” over the objection of counsel, without giving either plaintiff or his counsel any opportunity whatever to answer or produce evidence on that charge. As stated in *U. S. v. Van de Mark*, 3 F. Supp. 101, when one man acts as “inquisitor, interpreter, prosecutor and judge”

“The trial moves rapidly on when the judge has determined the sentence beforehand.”

The third point to be considered is the right of cross-examination of witnesses which was refused: As pointed out above, Exhibit A in the 1935 hearing, the alleged sworn statement of one Marta Rodriguez Carabello, purporting to have been taken from her in a sanitarium, but actually dictated by Inspector Leith

to a stenographer at some other time and place, and unsigned by her, was introduced in evidence over the objections of counsel; over and over again, counsel specifically requested the right of cross-examination of all of the persons from whom the inspector took statements. Even though this woman is reported to have stated that she would be willing to appear as a witness, up to the very last few minutes of the hearing, counsel's repeated demands were ignored. Notwithstanding, the Board of Review recommendation relied upon this woman's statement, Exhibit A, and the other four purported statements, as "the principal evidence in support of the charges against the alien." The Board examiner merely noted the objections of counsel as to Carabello and stated: "It appears probable that her testimony might have been taken by going to the institution for the purpose, but this was not done."

As to Josefina Ruiz (Ex. D, 1935) the refusal of the Inspector to call her for cross-examination was excused by the Board examiner on the statement that "possibly because her statements were not as clear and definite in support of the warrant charges as those of the other witnesses." In other words, because the ex parte witness Ruiz had given a statement quite favorable to the plaintiff, and which did not "support the warrant charges," the Inspector refused to call her as a witness at the hearing and contented himself with introducing her ex parte statement, and denying any examination of her by counsel.

The serious consideration given to at least two ex parte statements as part of the "principal evidence" to sustain the warrant charges against the respondent, where the makers of the statements could have been produced at the hearing, renders the hearing and decision unfair; *Ungar v. Seaman*, 4 F. 2d 80 (C.C.A. 8, 1924); *Whitfield v. Hanges*, supra; *Schenck v. Ward*, 6 F. Supp. 739; *Ex parte McMahon*, 1 F. 2d 456; *Ex parte Chin Loy Yow*, 223 Fed. 833; *Gonzales v. Zurbrick*, supra; *Svarney v. U. S.*, 7 F. 2d 515; and *Maltez v. Nagle*, 27 F. 2d 835. It seems more than significant that the cases wherein such practices of the Service have been most severely criticized are those involving charges that the respective respondents were engaged in the managing of houses of prostitution, and the "evidence" relied upon consisted of statements of members of that oldest profession in the world—as in *Whitfield* and *Svarney*, supra.

(5) The Inspector made secret representations which influenced the Board of Review: Months after the hearing was completed, the record was forwarded by the District Director at San Juan to the Commissioner (January 2, 1936). Contrary to the practice prescribed in Lecture 22, the District Director himself made no recommendation to the Commissioner; this was error, of course. The only recommendation was made by Inspector Leith, who recommended plaintiff's deportation. To this, the Inspector appended a pageful of statements headed up

"Comments by Inspector Leith"

These comments consisted in attacks upon the testimony of eight witnesses, whose testimony in open hearing was favorable to the plaintiff. As an example, the Inspector attacked the testimony of witness Jenaro de Jesus by stating that this witness had not reported to the authorities an alleged house of prostitution next door to Mesina's house.

The record shows that witness de Jesus was not asked if he knew that there was a house of prostitution further down the street or in the vicinity and he was not asked as to whether, if he knew of the existence of such a place, he had or had not reported it to the authorities. Additionally, there is no evidence of record that he had not made such a report. The Inspector went on to suggest and request that the testimony of each and every witness favorable to plaintiff "be not considered" in his (plaintiff's) behalf and favor.

We next find that the allegations of Inspector Leith in his "comments" were not known to plaintiff or his counsel, who had no notice of them and no opportunity to rebut them. Notwithstanding, turning to page 4 of the Board of Review recommendation, we find the Board examiner adopting in toto the unfounded and unsupported statement regarding witness de Jesus, and, in fact, adopting virtually completely all of the "comments" of Inspector Leith.

The case of *Ungar v. Seaman*, supra, is relied upon by the Special Inquiry Officer in this case as the leading case on matters related to fairness of hear-

ing; in that case the Circuit Court of Appeals (4 F. 2d at pages 84 and 85) said:

“The introduction and receipt by the assistant Secretary of Labor, after the hearing was closed, without notice to or knowledge of the accused, of the hearsay statements of the immigration inspector * * * was grossly unfair and unjust. * * * Its receipt and consideration violated the indispensable condition of a fair hearing of a litigated issue that the case shall be decided on the evidence at the hearing, when parties or their counsel were present and that neither party nor court or quasi-judicial tribunal shall subsequently receive evidence without notice to the party to be affected or their counsel and time and opportunity to rebut it.”

CONCLUSION.

We believe that the record in this case is such that the Court in examining all the proceedings will find that there has been a gross miscarriage of justice.

In view of the foregoing we respectfully submit that justice and fairness require that the decision of the District Court be held to be in error.

We therefore ask this Court to grant appellant the declaratory and injunctive relief which has been denied him by the District Court.

Dated, San Francisco, California,
September 21, 1959.

Respectfully submitted,

NORMAN STILLER,

Attorney for Appellant.

No. 16448

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GREGORIO ARCIAGA MESINA,

Appellant,

vs.

RICHARD C. HOY, District Director of Immigration and
Naturalization Service, Department of Justice,

Appellee.

BRIEF OF APPELLEE.

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No. 16448

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GREGORIO ARCIAGA MESINA,

Appellant,

vs.

RICHARD C. HOY, District Director of Immigration and
Naturalization Service, Department of Justice,

Appellee.

BRIEF OF APPELLEE.

Jurisdiction.

Appellant, plaintiff below, sought to enjoin enforcement of an order of deportation outstanding against him and also sought a declaratory judgment both rendering void another, prior, deportation order executed in 1936 and declaring that appellant is a permanent resident of the United States [R. 10].¹ Judgment in the District Court was rendered in favor of appellee upholding the validity of the deportation order [R. 41]. The Court below had jurisdiction of appellant's action under the provisions of the Declaratory Judgment Act; 28 U. S. C. A., Section 2201, and Section 10 of the Act of June 11, 1946 (Administrative Procedures Act), 60 Stat. 243, 5 U. S. C. A., Section 1009 (*Shaughnessy v. Pedreiro*, 349 U. S. 48 (1955)). The judgment of the District Court being a final decision, jurisdiction is conferred upon this Court by 28 U. S. Code, Section 1291.

¹"R." refers to the Printed Transcript of Record, "Br." indicates references to appellant's Opening Brief.

Statement of the Case.

Appellant is an alien, a native and citizen of the Philippines [R. 15]. He first entered the United States in 1924 (Br. 1). On June 25, 1935, a warrant of arrest and deportation was issued charging that appellant was deportable in that he was "found managing a house of prostitution, music hall, or other place of amusement where prostitutes gather." [Plaintiff's Exhibit I in evidence, the Certified Administrative Record, with attached Ex. 5]. In February of 1936, the Board of Immigration Appeals upheld appellant's deportability and on February 27, 1936 a warrant of deportation was issued charging that he was deportable under the Act of 1917, in that "he has been found managing a house of prostitution, and has been found receiving, sharing in, or deriving benefits from the earnings of a prostitute." [Certified Administrative Record, Ex. 5]. Appellant was deported on that order to the Philippines on April 18, 1936 [R. 4; Br. 3].

On December 31, 1956, appellant entered the United States at Baltimore, Maryland, as a crewman [R. 5; Deft. Ex. A in evidence]. Prior to his 1956 entry, appellant had made no attempt to obtain the consent of the Attorney General to his applying for admission and had made no application pursuant to Section 212(a)(17) of the Act of June 27, 1952, 66 Stat. 182; 8 U. S. C. A. 1182(a)(17). [R. 5; Br. 2]. Appellant's original "Crewman's Landing Permit" required his departure from the United States on or before January 30, 1957 [Deft. Ex. A in evidence]. This time limit was extended to February 27, 1957 [R. 5].

On January 28, 1957 appellant was granted permission to depart the United States in lieu of deportation, which

he did not do. On June 11, 1957 an Order to Show Cause Re Deportation as a nonimmigrant who remained in the United States longer than permitted was lodged, and on June 28, 1957 a Special Inquiry Officer determined appellant deportable under Section 241(a)(2) of the Act of June 27, 1952, 66 Stat. 204; 8 U. S. C. A. 1251(a)(2). [Certified Administrative Record]. The Order to Show Cause under the present deportation hearing did not contain any charge of deportability under Section 242(f) of the Act of June 27, 1952, 66 Stat. 208; 8 U. S. C. A. 1252(f) entitled "Unlawful Re-entry." [Certified Administrative Record, Ex. 1].

On December 12, 1957 the Board of Immigration Appeals ordered a reopened hearing in order to include the record of the 1935 deportation hearing and on February 17, 1958 the Special Inquiry Officer again found the appellant deportable under the charge in the Order to Show Cause. A deportation order was issued [R. 7, 9; Certified Administrative Record]. This order was confirmed by the Board of Immigration Appeals on August 7, 1958 [R. 9; Certified Administrative Record]. In October 1958, appellant was given the right of voluntary departure which he did not exercise [R. 9; Certified Administrative Record].

On October 16, 1958, appellant filed a Complaint in the Court below seeking to enjoin enforcement of the deportation order outstanding against him and also seeking a declaratory judgment which would render void the deportation order executed in 1936 and declare appellant to be a permanent resident of the United States [R. 10]. The validity of the final order of deportation was upheld in the Judgment of the District Court and the injunction and other relief prayed for by the appellant were denied [R. 41].

Issues Presented.

1. Must appellant be charged as deportable under Section 242(f) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1252(f)) rather than Section 241(a)(2) of the Act of 1952 [8 U. S. C. 1251(a)(2)] because of the fact that he was previously deported?

2. Is appellant entitled to have the administrative record of his first deportation reviewed in this action when that deportation has long since been executed?

3. Assuming, solely for the purpose of argument, that the 1936 deportation order is subject to attack in this proceeding, do the 1935-1936 proceedings reflect a gross miscarriage of justice?

Statutes and Regulations Involved.

Section 101 of the Immigration and Nationality Act of 1952, 66 Stat. 166, 8 U. S. C. A., Section 1101, insofar as is pertinent to this proceeding, provides:

“(a) As used in this chapter—

* * * * *

“(15) The term ‘immigrant’ means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * * *

“(D) an alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel (other than a fishing vessel having its home port or an operating base in the United States) or aircraft, who intends to land temporarily and solely in pursuit of his calling as a

crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

* * * * *

“(g) For the purposes of this chapter any alien ordered deported (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.”

Section 212(a)(17) of the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U. S. C. A. Section 1182(a)(17) provides:

“(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

“(17) Aliens who have been arrested and deported, or who have fallen into distress and have been removed pursuant to this chapter or any prior act, or who have been removed as alien enemies, or who have been removed at Government expense in lieu of deportation pursuant to section 1252(b) of this title, unless prior to their embarkation or reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their applying or reapplying for admission;”

Section 241(a) of the Immigration and Nationality Act of 1952, 66 Stat. 204, 8 U. S. C. A. Section 1251(a), insofar as is pertinent to this proceeding, provides:

“(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

“(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;

* * * * *

“(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 1258 of this title, or to comply with the conditions of any such status;

“(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 1182(a) of this title; or is or at any time after entry has been the manager, or is or at any time after entry has been connected with the management, of a house of prostitution or any other immoral place;”

Section 242 of the Immigration and Nationality Act of 1952, 66 Stat. 208, 8 U. S. C. A. Section 1252, insofar as is pertinent to this proceeding, provides:

“Penalty for willful failure to depart; suspension of sentence

(e) Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the classes described in paragraphs (4)-(7), (11), (12), (14)-(17), or (18) of section 1251 (a) of this title, . . .

* * * * *

“Unlawful reentry

(f) Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, or any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) of this section the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.”

Section 252 of the Immigration and Nationality Act of 1952, 66 Stat. 220, 8 U. S. C. A. Section 1282, insofar as is pertinent to this proceeding, provides:

“(a) No alien crewman shall be permitted to land temporarily in the United States except as provided in this section and sections 1182 (d) (3), (5) and 1283 of this title. If an immigration officer finds upon examination that an alien crewman is a non-immigrant under paragraph (15) (d) of section 1101 (a) of this title and is otherwise admissible and has agreed to accept such permit, he may, in his discretion, grant the crewman a conditional permit to

land temporarily pursuant to regulations prescribed by the Attorney General, subject to revocation in subsequent proceedings as provided in subsection (b) of this section, and for a period of time, in any event, not to exceed—

* * * * *

“(2) twenty-nine days, if the immigration officer is satisfied that the crewman intends to depart, within the period for which he is permitted to land, on a vessel or aircraft other than the one on which he arrived.”

8 C. F. R. Section 242.6 (1958) provides:

“§ 242.6 Aliens deportable under section 242 (f) of the act. In the case of an alien within the purview of section 242 (f) of the act, the order to show cause shall charge him with deportability only under section 242 (f) of the act. The prior order of deportation and evidence of the execution thereof, properly identified, shall constitute prima facie cause for deportation under that section.”

8 C. F. R. Section 242.22 (b) (1958) provides:

“(b) Deportability. In determining the deportability of an alien alleged to be within the purview of § 242.6, the issues shall be limited solely to a determination of the identity of the respondent, i. e., whether the respondent is in fact an alien who was previously deported, or who departed while an order of deportation was outstanding; whether the respondent was previously deported as a member of any of the classes described in paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a) of the act and whether respondent unlawfully reentered the United States.”

ARGUMENT.

I.

There Is No Compulsion to Proceed Under Section 242(f) Because It Is a Procedural Section Only, Not a Substantive One, and the Only Substantive Basis for Deportation Is Under Section 241(a) (2)(9).

Appellant contends that the “only appropriate charge” on the record in the present case is under Section 242 (f) of the Act of 1952 [8 U. S. C. 1252 (f)], charging unlawful re-entry after a previous lawful deportation, which previous order should be reinstated. The deportation order here is based on Section 241 (a) (2) (9) and charges appellant as an alien crewman who was admitted as a non-immigrant and failed to comply with the conditions of such status by overstaying the 29 days leave or extension thereof.

Appellant cites *United States ex rel. Blankenstein v. Shaughnessy*, 112 Fed. Supp. 607 (S. D. N. Y. 1953) in support of his contention.

Appellee submits that the *Blankenstein* case is clear authority to the contrary. In that case, which was a habeas corpus proceeding, the relator urged, as does the appellant here, that Section 242 (f) was the “sole and exclusive” remedy for deporting him and that deportation proceedings “ab initio” were unauthorized. The basis for this contention was a deportation order for Blankenstein which had been issued in 1924, followed in 1930 by his departure from the United States. The warrant of arrest in the *Blankenstein* case is similar to the order to show cause in the present case in that there was no reference to Section 242 (f), deportability having been charged un-

der Section 241 (a) of the 1952 Act alone. (112 Fed. Supp. at p. 611).) As in the present appellant's case the prior warrant of deportation had been based upon one of the grounds described in subsection (e) of Section 242 of the Act of 1952 (*Ibid* at p. 610); the ground involving appellant is stated in Section 241 (a) (12) of the Act of 1952.

The relator's contentions in the *Blankenstein* case were refuted on the basis that until the Attorney General, pursuant to Section 242 (f) has made certain specific findings, after notice of this charge to the alien and a hearing thereon, there is no reinstatement of the previous order of deportation (*Ibid.* at p. 610). The last of the three findings required, as noted in the quote on page 4 of appellant's opening brief is that the alien "had unlawfully re-entered." There was no such finding in the present case. See 8 C. F. R., Section 242.22 (b).

The "semblance of plausibility" given to the appellant's argument by Section 242.6 of the Regulations and to that of the relator in the *Blankenstein* case by former section 242.71, in that "an alien within the purview of Section 242 (f)" shall be charged in the order to show cause "only under Section (f)," was dismissed by the New York district court as an erroneous evaluation of Section 242 (f) as a "substantive provision, rather than an enforcement one which comes into play only subsequent to a finding of deportability." (*Ibid.* at pp. 610-611).

The view taken in the *Blankenstein* case concerning the nature of Section 242 (f) of the Act of 1952 [8 U. S. C. 1252 (f)] was also taken in *De Souza v. Barber*, 263 F. 2d 470 (9th Cir. 1959) cert denied, 359 U. S. 989, 3 L. Ed. 978, 79 S. Ct. 1118 (1959). The *De Souza*

case involved an appeal from an order denying a writ of habeas corpus and an appellant who had previously been deported. The appellant in that case had re-entered the United States without a visa and as a result of a hearing on an order to show cause, the previous order of deportation was reinstated in accordance with Section 242 (f) of the Act of 1952. [8 U. S. C. 1252 (f)]. In answering the appellant's contentions of error in that the trial court had refused to review the earlier, 1929, deportation proceedings, it was stated as follows:

"[1-3] Under these facts, when appellant entered the United States on June 29, 1957, he was a deportable alien within the meaning of 8 U.S.C.A. § 1251 (a) (1), by reason of his lack of a visa or other document permitting entry. This is the basic and substantive ground of deportation. While the warrant recites that deportation was pursuant to 'Sec. 242 (f) of the Immigration and Nationality Act' (8 U. S. C. A. § 1252 (f) for unlawful reentry after having been deported, this section is a procedural and enforcement provision. A hearing was held pursuant to this section and relevant regulations, and the required findings were made with respect to appellant's identity, prior deportation as a member of a class described in 8 U. S. C. A. §1251 (a) (4), and his unlawful re-entry. On the basis of such findings the order for deportation was properly reinstated pursuant to section 1252 (f). But, as Judge Weinfeld said in *United States ex rel. Blankenstein v. Shaughnessy*, D.C., 112 F. Supp. 607, 610, 611, 'the ground of deportability of an alien who illegally reentered after a prior final order of deportation is predicated not upon § 242 (f) (8 U. S.

C. A. 1252 (f)), but upon § 241 (a) (1) (1251 (a) (1)) of the Act.' There was a full compliance with the applicable statutes and regulations." (263 F. 2d at p. 474).

Thus, even where there has been compliance with all of the necessary procedural requirements for a reinstatement of a prior order of deportation, the substantive basis for deportation remains one of the grounds enumerated in Section 241 (a) of the 1952 Act [8 U. S. C. 1251 (a)].

The substantive provision relied upon by the appellee in the present case is Section 241 (a) (2) [8 U. S. C. 1251 (a) (2)] quoted herein. Appellant is clearly in violation of Section 241 (a) (9) [8 U. S. C. 1251 (a) (9)] as one who was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to comply with the conditions of any such status. Exhibit A in the record on appeal which contains the "Crewman's Landing Permit" indicates the findings of the immigration officer at Baltimore, Maryland, pursuant to Section 252 (a) of the Act of 1952 [8 U. S. C. 1282 (a)], that appellant was a nonimmigrant under 8 U. S. C. A. 1101 (a) (15) (D). That appellant fulfilled the definition of a nonimmigrant alien crewman stated in the latter subsection is borne out by the facts; whether he had also been the subject of a previous deportation and had not applied for permission to apply for readmission under Section 212 (a) (17) of the Act of 1952 [8 U. S. C. 1182 (a) (17)] is not material in view of the "basic and substantive" grounds for deportation under 8 U. S. C. A. 1251 (a) (2).

That an alien crewman who overstays his permitted time in the United States and abandons his status as a nonimmigrant is subject to deportation on that ground is well established in the law.

Philippides v. Day, 283 U. S. 48, 75 L. Ed. 833, 51 S. Ct. 358 (1931);

Foundoulis v. Lehmann, 255 F. 2d 104 (6th Cir. 1958);

Delany v. Moraitis, 136 F. 2d 129 (4th Cir. 1943);

United States ex rel. Rios v. Day, 24 F. 2d 654 (2d Cir. 1928), cert. denied 277 U. S. 604, 72 L. Ed. 1011, 48 S. Ct. 601 (1928);

United States ex rel. Anderson v. Karnuth, 46 F. 2d 689 (W. D. N. Y. 1930).

II.

Appellant Is Not Entitled to Have the Administrative Record of His First Deportation Reviewed in This Action When That Deportation Has Long Since Been Executed.

The appellant in *De Souza v. Barber*, 263 F. 2d 470 (9th Cir. 1959), cited *supra*, was attempting to obtain a review of deportation proceedings held in 1929 pursuant to which he had been deported. The 1957 deportation proceedings had resulted in a reinstatement of the previous deportation order. In denying the appellant's contention that the refusal to review the 1929 hearings had constituted error in the trial court, it was stated in the opinion of the circuit court as follows:

“[4] Appellant's entire case is based upon alleged infirmities in the deportation order in 1930. As the trial judge well said, ‘The petitioner would have this court disinter his first deportation order which was issued in 1930 and examine the evidence

on which it was based.' Yet for a period of more than 26 years, between his deportation in 1930 and entry in 1957, appellant did not seek any review of the order of deportation or question its validity. He did not seek permission for entry from the Attorney General under either sections 1182 (a) (17) or 1181 (b). He did not seek lawful entry under sections 1182 or 1226. Under these circumstances the order of deportation of 1930 is not subject to collateral attack in this proceeding.

This conclusion is strengthened by 8 U. S. C. A. § 1101 (g): 'For the purposes of this chapter any alien ordered deported (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.' In our opinion appellant must be 'considered to have been deported in pursuance of law.' particularly in view of the long period of acquiescence in the deportation order." (263 F. 2d at pp. 474-75).

The statement in the *De Souza* case can be applied without change, save for a change in the dates, to the present case. The appellant in the instant case bases his entire case upon alleged infirmities in the 1936 order. No review was sought on the appellant's behalf for a period of more than 20 years, nor was the validity of the order questioned. There was no attempt by the appellant to avail himself of the provisions of sections 1182, 1181 or 1226. The order of deportation of 1936 should not here be any more subject to collateral attack than was the 1930 order in the *De Souza* case; the provisions of 8 U. S. C. A. 1101 (g) are no less applicable.

III.

Assuming, Solely for the Purpose of Argument, That the 1936 Deportation Order Is Subject to Attack in This Proceeding, There Is No Indication of a Gross Miscarriage of Justice in the 1935-1936 Proceedings.

An attempt was made in *United States ex rel. Steffner v. Carmichael*, 183 F. 2d 19 (5th Cir. 1950) cert. denied, 340 U. S. 829, 95 L. Ed. 609, 71 S. Ct. 67 (1950), to collaterally attack a previous order of deportation. In disallowing such an attack it was stated in the opinion as follows:

“[1] Where an alien has been deported from the United States pursuant to a warrant of deportation, we do not think it permissible to allow a collateral attack on the previous deportation order in a subsequent deportation proceeding, unless we are convinced that there was a gross miscarriage of justice in the former proceedings. There are numerous cases where aliens have been deported several times, and if in each subsequent case the validity of the previous deportation order had to be determined, there would be no end to the proceedings cast upon administrative agencies.” (183 F. 2d at p. 20).

It is submitted that, considered as a whole, the record of the 1935-1936 proceedings involving appellant, as contained in Exhibit 5 attached to the Certified Administrative Record, most clearly does not indicate a gross miscarriage of justice. See also *Daskaloff v. Zurbrick*, 103 F. 2d 579 (6th Cir. 1939).

It is immaterial whether or not appellant in 1936 was a national or a person subject to deportation as though

he were an alien, because the previous deportation order was executed without appeal and there is no dispute that appellant at this time is an alien who entered as a crewman and has overstayed his time, and is therefore deportable under Section 241 (a) (2) (9) *supra*.

Assuming, solely for the purpose of argument, that appellant's status in 1936 is subject to present examination, the treatment, at that time, of the appellee as an alien for immigration purposes was valid.

In a part of the Act of March 24, 1934 providing for the independence of the Philippine Islands, ch. 84, Section 8, 48 Stat. 462, formerly 48 U. S. C. (1934 Ed.), Section 1238, the status of citizens of the Philippine Islands was defined as follows:

“(1) For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (except section 13 (c)), this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty. . . .”

By its terms the Act was not effective until accepted by the Philippine people; such acceptance occurred on May 1, 1934.

Cabebe v. Acheson, 183 F. 2d 795 (9th Cir. 1950).

These specific provisions continued in force until July 4, 1946 when the Philippines achieved full independence (*Ibid* at p. 795).

The warrant of arrest and deportation involved in appellant's original deportation was issued on June 25, 1935, over one year after Section 8 of the Act of 1934 (48 U. S. C. (1934 Ed.), Section 1238) became effective. The record of the 1935-1936 proceedings indicates that the activities for which appellant was deported continued well beyond May 1, 1934, assuming, arguendo, that such a continuation would be necessary. (Page 5 of the Report of Hearing contained in Exhibit 5 attached to the Certified Administrative Record; pages 1 and 2 of the statement under oath by Marta Caraballo made on August 21, 1935 and contained in Exhibit 5 of the C. A. R.; page 1 of the sworn statement of Maria Perez, made on August 8, 1938 and contained in Exhibit 5 of the C. A. R.)

Section 8 of the Independence Act (48 U. S. C. (1934 Ed.) Section 1238)) was the law when appellant was originally deported. It cannot be contended that the interpretation of the law between 1934 and 1946 indicated by appellant's original deportation was not the correct interpretation. Even if the interpretation during that period were, at present, deemed incorrect, a change in interpretation would not allow a reopening of the 1935-1936 proceedings. As stated in *United States ex rel. Steffner v. Carmichael*, 183 F. 2d, 19, 20 (5th Cir. 1950)

“ . . . If it were true that a change in the interpretation of the law applicable to a cause prosecuted to judgment entitled the party who had been affected by such change to reopen the controversy, lawsuits would not be settled with finality. . . . ”

Conclusion.

It is respectfully submitted that the judgment of the District Court upholding the validity of the deportation order and denying the relief prayed for in the Appellant's Complaint, should be affirmed.

Respectfully submitted,

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No. 16,448

United States Court of Appeals
For the Ninth Circuit

GREGORIO ARCIAGA MESINA,
Appellant,

vs.

RICHARD C. HOY, Director of Immigration
and Naturalization,
Appellee.

Appeal from the United States District Court for the
Southern District of California,
Central Division.

APPELLANT'S REPLY BRIEF.

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United States Court of Appeals For the Ninth Circuit

GREGORIO ARCIAGA MESINA,	} <i>Appellant,</i>
vs.	
RICHARD C. HOY, Director of Immigration and Naturalization,	

Appeal from the United States District Court for the
Southern District of California,
Central Division.

APPELLANT'S REPLY BRIEF.

In our opening brief, we argued that under 8 USC 1252(f) it was mandatory to reinstate the deportation order of 1936. Appellee in its brief argues that the government is free to disregard the order of 1936, and that it can and does base the present deportation order solely upon the new charge of having overstayed a non-immigrant's time limit. (R. 39, Findings; Appellee's Br. p. 9 ff.)

Appellee having chosen to contest the appeal on this basis, it is necessary to point out that the result must be the same either way. The record of the earlier proceeding is part of the present record (Pet. Ex.

5). For reasons stated in the opening brief and further developed below, this order is void and subject to collateral attack. The previous deportation order being void, appellant never legally interrupted his United States residence, made no new "entry" in 1956, and was never subject to the limitations of 8 USC 1251(a)(2), and 8 USC 1282.

This is true for the following reasons:

The charges under which the 1936 deportation proceedings were brought, were based on statutes which required either (1) *present* conduct; or (2) conduct "after entry".

(1) So far as present conduct is concerned, the following dates are significant.

(a) The Philippine Independence Act took effect May 14, 1935 (see below).

(b) The warrant on which the 1936 deportation was based was dated June 25, 1935 (R. 23, Ex. 5, Report of Hearing giving number of warrant as No. 55897/723, and date of warrant, as June 25, 1935; Warrant itself, following report, and dated June 25, 1935).

Consequently the conduct of appellant *as an alien* was limited to the narrow six-weeks period, May 14-June 25, 1935.

The record of the 1935 hearing (Ex. 5) *contains no evidence placing any acts of appellant within that period*, but does contain testimony limiting his alleged conduct to a time previous to May 14, 1935, *when appellant was not an alien but a United States National.*

(2) So far as appellant was charged in 1935 with acts “after entry”, they were not grounds of deportation for a Filipino at all. (*Barber v. Gonzales*, 347 U.S. 637; *Mangoaong v. Boyd*, 205 F. 2d 553 (CA 9).)

We shall first point out the arguments of our opening brief which the appellee does not even attempt to answer or which it misstates; and then we shall show, that the 1936 deportation involved a “gross miscarriage of justice” in that appellant was summarily treated as being and having been an alien for all purposes when in fact he had been a United States National during part of the time involved and never an alien for all purposes—and this partly upon evidence which has itself been held to invalidate the proceedings.

Then we shall review the present status of the 1935-6 deportation order; then we shall show that this order should be held invalid even under the appellee’s own authorities.

I. POINTS NOT ANSWERED BY APPELLEE OR MISSTATED.

A. Argument Not Answered.

Appellee makes no specific answer to the recital of the unfairness of the 1935 deportation hearing. (Appellant’s Op. Br. pp. 9-18.) Appellee contents itself with the single sentence at appellee’s brief p. 15:

“It is submitted that, considered as a whole, the record of the 1935-1936 proceedings involving appellant, as contained in Exhibit 5 attached to the

Certified Administrative Record, most clearly does not indicate a gross miscarriage of justice.”

Daskaloff v. Zurbrick, 103 F. 2d 579 (CCA 6) is cited, which we discuss below.

In particular, appellee makes no answer to the point that the use at the 1935 hearing, of *ex parte* statements, taken out of the presence of appellant, rendered that hearing unfair, and subject to collateral attack on *habeas corpus*. The cases on this point are collected at appellant’s opening brief, p. 16. Appellee does not so much as mention one of them, or discuss their impact on the case.

B. Misstatement by Appellee.

At appellee’s brief, p. 16, appellee misstates our contentions. It is said,

“there is no dispute that appellant is an alien *who entered* as a crewman and has overstayed his time * * *”. (Italics added.)

It is *disputed* that appellant “entered” in 1956.

We have already indicated our position that if the 1935-6 deportation was illegal and void, it did not constitute a deportation, but that nevertheless appellant’s departure was undeniably not voluntary under 8 USC 1101(a)(13). Appellee’s return in 1956 would therefore not constitute an “entry”. Compare *Delgadillo v. Carmichael*, 332 U.S. 388; and *Barber v. Gonzales*, 347 U.S. 637.)

II. PRESENT STATUS OF 1935-6 DEPORTATION PROCEEDINGS.

A. Appellee's Argument as to Status of 1935-6 Deportation Order.

1. Appellee cites three cases on the vulnerability of a prior deportation. (Appellee's Br. pp. 13, 15.) These are *De Souza v. Barber*, 263 F. 2d 470; *U.S. ex rel. v. Carmichael*, 183 F. 2d 19 and *Daskaloff v. Zurbrick*, 103 F. 2d 579. These contain dicta as to when an earlier order may be attacked.

De Souza v. Barber, 263 F. 2d 470, 475 quotes the *Carmichael* case to the effect that there must be "a gross miscarriage of justice"; and quotes *Bilokumsky v. Tod*, 263 U.S. 149, 157, "that the defects" must have been such as "might have led to a denial of justice".

De Souza v. Barber, 263 F. 2d 470, 475 also refers to *Daskaloff v. Zurbrick*, 103 F. 2d 579, which indicates an even broader rule. There the Sixth Circuit declined to review an earlier deportation, but on the ground that upon the previous record "it does not appear that there was *an application of an erroneous rule of law*". (Italics added.) Inferentially, application of an "erroneous rule of law" is enough to make the first deportation subject to review.

2. Appellee also quotes the reference to 8 USCA 1101(g) which appears in *De Souza v. Barber*. (Appellee's Br. pp. 14, 16.) As we shall show, this section had a much narrower scope at the time of the Philippine Independence Act (45 Stats. at L. 1551), and its application here would raise the question left undecided in *Mangoaong v. Boyd*, 205 F. 2d 553, 556—whether the Philippine Independence Act incorporated not only existing but future immigration laws.

3. Appellee also quotes language from *U.S. ex rel. v. Carmichael*, 183 F. 2d 19, 20 that in testing the validity of the earlier deportation order, no account may be taken of changes in the law resulting from overruling decisions. (Appellee's Br. p. 17.) But there was no change in the law in the present case. As we shall show below, all relevant points of law have always been decided one way—against the validity of the 1935-6 deportation.

Questions depending upon the Philippine Independence Act were then new. Appellee does not claim that there were any Court decisions tending to uphold the deportation—rather it attempts to lift itself by its bootstraps by citing the 1935-6 proceeding as itself establishing “the law”. (Appellee's Br. p. 17.) Since the questions have reached the Courts, relevant holdings have been against the government's contentions. On other phases of the case the law had already been crystallized against the validity of the proceeding.

B. Effect of Availability of Habeas Corpus.

1. *Habeas Corpus* is the statutory mode of attacking a deportation order (28 USC 2241). But habeas corpus is itself a collateral attack on the judgment or order in question. (*Herndon v. Lowry*, 301 U.S. 242, which contrast with *Herndon v. Georgia*, 295 U.S. 441; *Mooney v. Holohan*, 294 U.S. 103; *Moore v. Dempsey*, 261 U.S. 86.)

Lapse of time is ordinarily no objection to the granting of the writ (*Mooney v. Holohan*, 294 U.S. 103) nor is the fact that the order or judgment has be-

come final, either after appeal (*Herndon v. Lowry*, 301 U.S. 242) or without appeal (*Moore v. Dempsey*, 261 U.S. 86).

Appellee has not cited any statute of limitations specially governing *habeas corpus* in deportation proceedings, and we have found none.

2. The grounds which support *habeas corpus* are therefore, by definition, grounds for collateral attack on the prior deportation order. Where collateral attack is available at all, it is immaterial that appellant did not pursue other remedies which would have assumed the deportation to be valid. (Cf. Appellee's Br. pp. 12, 14.)

III. PRIOR DEPORTATION ORDER ENTAILED APPLICATION OF AN "ERRONEOUS RULE OF LAW", "GROSS MISCARRIAGE OF JUSTICE", UNDER CITED DECISIONS.

In showing that the 1935-36 deportation order involved a "gross miscarriage of justice", and *a fortiori*, "An application of an erroneous rule of law" we shall show *first*, the legal status of Filipinos, and that the 1935-6 proceedings completely disregarded that status; and *second*, that the procedure in the 1935-6 case violated elementary and well-settled rules.

A. 1935-6 Deportation Proceedings Disregarded Legal Status of Filipinos.

In showing that the 1935-6 deportation proceedings wholly disregarded the special status of Filipinos, we shall first summarize the applicable law, and then refer to the record (Exh. 5) to show that this law was disregarded.

1. Law Applicable to Filipinos.

a. Appellee cites *Cabebe v. Acheson*, 183 F. 2d 795, 799, to the effect that the Philippine Independence Act took effect on May 1, 1934. (Appellee's Br. p. 16.) But both before and subsequently, the Ninth Circuit has held that the Philippine Independence Act took effect on May 14, 1935. (*Del Guercio v. Gabot*, 161 F. 2d 559, 560; *Mangoaong v. Boyd*, 205 F. 2d 553, 554.)

Hackworth's Digest of International Law, vol. 1, ch. 4, pp. 495-7 also takes the 1935 date as the effective date.

Before the effective date of the Independence Act, *Filipinos* were American Nationals, not aliens. *Rabang v. Boyd*, 353 U.S. 427; *Barber v. Gonzales*, 347 U.S. 637.

b. (1) In the 1935-6 proceeding, appellant was charged with managing a house of prostitution, and with receiving the earnings of a prostitute. (Ex. 5.) The statute as of that time was in the present (or future) tense—it dealt with *current activity*.

See Immigration Act 1917, 39 Stats. at L. 874, sec. 19 (p. 889):

“Any alien * * * who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather * * *”

Mangoaong v. Boyd, 205 F. 2d 553, 555 holds that such a statute, cast in the present tense, requires a

Filipino to have been an alien when the acts charged were committed, in order to be deportable.

As already stated, the warrant in the 1935-6 proceeding was issued June 25, 1935. Consequently that deportation order could have been legally based only on acts committed in the narrow six-weeks period between May 14, 1935 and June 25, 1935.

(2) If subsequent amendments to the deportation act are of any importance, the present statute dealing with prostitution is an "after entry" act, 8 USC 1251 (a)(12); 8 USC 1182(a)(12).

"After entry" statutes do not apply to Filipinos who entered before the Philippine Independence Act. *Barber v. Gonzales*, 347 U.S. 637. (Appellant came to the continental United States in 1931, Ex. 5, Warrant; testimony of Appellant, p. 3 of hearing transcript.)

2. Record of Prior Deportation Disregards Status of Filipinos.

As already indicated, the valid proof in the 1935-6 deportation proceedings was limited to the short period, May 14-June 25, 1935. Otherwise appellant would have been deported (and would now be deported) for acts done when he was not an alien. (This distinguishes the present case from those cited by appellee—*De Souza v. Barber*, 263 F. 2d 470; *U.S. ex rel. Steffner v. Carmichael*, 183 F. 2d 19; *Daskaloff v. Zurbrick*, 103 F. 2d 579. In each of these the individual was an alien for all purposes: in *De Souza*, a Portuguese; in *Steffner*, a Swede; in *Daskaloff*, a Bulgarian. Filipinos present special problems.)

But the evidence on the 1935-6 hearings was not directed to the period May 14-June 25, 1935. *Apparently the case was tried on the theory that a Filipino was and always had been an alien for all purposes.* Compare page 2 of the hearing in Exhibit 5, which lists among those present, "Gregorio Messina, Alien". This designation is repeated throughout the exhibit. Not only was the evidence not related to the dates May 14-June 25, 1935, but where such evidence was related to specific dates, these *dates fell before May 14, 1935.*

The evidence consisted of two parts: (1) *ex parte* statements of witnesses taken by the immigration examiner out of the presence of appellant or his counsel; and (2) testimony of these witnesses at the hearing. (There were two *ex parte* statements of declarants who were not called as witnesses.)

We shall review *all* of this evidence in Exhibit 5, and show that *none* of it is tied to the six weeks, May 14-June 25, 1935.

In our next section we go into the additional points that use of the *ex parte* statements itself made the hearing unfair, and that this was aggravated by the fact that on the hearing the witnesses denied many of the statements which they had made *ex parte*.

a. *Gregorio Messina* (sic)—asked only about name, place and date of birth and date of entry into the U.S.

b. *Isabel Roman* (p. 4 of transcript of hearing in Ex. 5) testifies on Sept. 3, 1935:

“Q. Is it true that the house of George Messina (sic) has never been a house of prostitution?

A. I don't know.

Examining Officer:

Q. But the truth of the matter is that you were paying Messina for room and board and to pay him you had intercourse with men to get money. Is that correct?

A. Yes, sir.

Q. When was that?

A. *About six months ago*”. (Italics added.)

Six months before Sept. 3, 1935, was March 1935—a time when Appellant was still for all purposes a national of the United States.

The Immigration Service took an *ex parte* statement from this witness (Isabel Roman) on August 6, 1935. It is attached to the record of the 1935 hearings (Ex. 5) and within that Exhibit, is designated “Exhibit ‘B’ ”. This statement includes the following:

“Q. Have you ever lived in the house of the Filipino known as Messina?

A. Yes, I lived once there because he found me on the streets and took me over to his house.

Q. *How long did you live in his house?*

A. *27 days.*” (Italics added.)

There is no other identification of time in this *ex parte* statement. But coupling it with the testimony at the hearing (“about six months ago”) shows that the entire time referred to was evidently before May 14, 1935.

c. *Maria Luisa Portel*—testified Sept. 13, 1935—(her testimony begins on p. 6 of the hearings included in Exhibit 5):

(p. 7.)

“Q. Tell me: How long have you been living in the house of George Messina?

A. About five months.

Q. Did George Messina use his house for the business of prostitution?

A. No, never.”

The Immigration Service took this witness’s *ex parte* statement on August 20, 1935. The statement is marked Exhibit “E”, within *Exhibit 5*. There the witness said:

“Q. How long have you been living in Messina’s house?

A. I have been living in his house for about five months.”

“Five months” on August 20, means from March to August.

“Q. During the time that you have been living in his house, have you seen prostitutes coming there?

A. Yes, sir.”

There is no further identification of time. It was important to fix the time after May 14, 1935. The statement does not do so. (This is quite apart from the fact that the witness repudiated this statement at the hearing—see above.)

d. *Gregorio Laguna*, p. 7 of hearing transcript in Exhibit 5 (testifying on Sept. 13, 1935—see *id.* p. 6;

called by appellant) testifies that the appellant's house is not a house of prostitution.

e. *Jenaro de Jesus*, p. 10 of hearing transcript in Exhibit 5 (called by appellant) has known appellant since July 26, 1935; testifies that house of appellant is not a house of prostitution. (p. 11.)

f. *Petra Reynolds de Mateo*, p. 12 of the hearing transcript included in Exhibit 5 (called by appellant) testifies that his home is not a house of prostitution.

g. *Juan Gonzales Feliciano*, p. 13 of hearing transcript, in Exhibit 5 (called by appellant) testifies that Messina's house is not a house of prostitution.

h. *Petra Rivera Cruz*, p. 15 of hearing transcript in Exhibit 5 (called by appellant), testifies that his house is not a house of prostitution.

i. *Alba Rosario*, p. 17 of hearing transcript, Exhibit 5 (called by appellant) testified that appellant's house is not a house of prostitution.

j. *Jorge Pagan*, called at foot of p. 19, testimony begins on p. 20 of hearing transcript, Exhibit 5 (called by appellant), testified that appellant's house was not a house of prostitution.

k. *Alex Abraham*, p. 21 of hearing transcript, Exhibit 5 (called by appellant), testified that appellant's house was not a house of prostitution.

l. *Maria Luisa Perez*, p. 22 of hearing transcript in Exhibit 5:

“Q. What is your business or occupation?

A. I am a prostitute.”

* * * * *

“Q. Did you live with a Filipino in the house of George Messina?

A. Yes, I was living there with a Filipino, but I was doing business.”

No date is mentioned at all.

The witness gave an *ex parte* statement to the immigration authorities on August 8, 1935. It is marked “Exhibit ‘C’”, included in Exhibit 5. There the witness said:

“Q. What is your occupation?

A. I am a business woman (prostitute).

Q. How long have you been a prostitute?

A. About six years.

* * * * *

Q. Do you know one Filipino known by the name of Jorge or George Messina?

A. Yes, sir, I have lived in his house.

Q. When were you living in his house?

A. *From Jan. 1934 to Jan. 1935.*”

(Italics added.)

This definitely fixes the time *previous to May 14, 1935.*

m. *George Messina* (recalled, p. 24 of hearing transcript in Exhibit 5, September 17, 1935) testifies that he did not operate a house of prostitution—only a regular boarding house.

n. *Martin Burgos* (foot of p. 26 of hearing transcript in Exhibit 5; testimony begins on following page):

“Q. To your knowledge is the house of George Messina a house of prostitution?

A. I don't know that.

* * * * *

Q. Did you or did you not say that the house of the Filipino was a house of prostitutes?

A. No, I did not say that.”

o. *Clerk José Ramirez* (p. 28 of hearing transcript in Exhibit 5):

“Q. Mr. Ramirez, please relate in your own words as near as possible the entire conversation that took place in the house of Martin Burgos.

A. This morning at about 10:30 A.M. * * * Then Burgos told Mr. Leith that he was insulting him as well as those two girls because his house was a decent and respectable, but that the house of the Filipino was a house of prostitutes and he refused to make any further statements in this respect. * * *”

Martin Burgos (recalled, p. 30 of hearing transcript in Exhibit 5):

“Q. And you did not tell him that the house of the Filipino was a house of prostitutes?

A. Nothing about it. I told him I was a Puerto Rican and that there were no Filipinos there. Then he went up in the air. I was not drunk.”

If the hearsay statement of José Ramirez be taken to refer to the time it was spoken (Sept. 12, 1935) it is the only item which refers to a time subsequent to May 14, 1935. (It would also refer to a time subsequent to the warrant, June 25, 1935.) This was denied

by the person to whom it was attributed (Martin Burgos).

The following *ex parte* statements were also introduced, without any attempt to call the witnesses who gave them:

Maria Rodriguez Caraballo (designated Exhibit "A" as part of Exhibit 5); the *ex parte* statement was given August 21, 1935, at the *Women's Ward of the Insular Sanatorium Rio Piedras, P.R.*

"Q. Do you know George Messina?

A. Yes, sir.

Q. How long have you known him?

A. About one year.

* * * * *

Q. Did you know Isabelita?

A. I know her by name.

* * * * *

Q. What was the reputation of Isabelita?

A. I don't know.

Q. Was she a prostitute?

A. I think so.

* * * * *

Q. During the time you lived in the house of Messina, did any prostitute go there?

A. Yes, I have seen several.

* * * * *

Q. How long have you been a prostitute?

A. About three years.

Q. Did you do business with men in the house of Messina?

A. Yes, sir.

* * * * *

Q. Did Isabelita live there at the same time?

A. Yes.

Q. What other women lived there?

A. Maria Luise and Aurora.

* * * * *

Q. Then, you know that Messina lived on what prostitutes earned?

A. Yes, sir.

Q. Did Messina know you were prostitutes?

A. Yes.

* * * * *

Q. Was this woman called Aurora a prostitute?

A. Yes, sir.

* * * * *

Q. *How long have you been here?*

A. *About five months.*" (Italics added.)

If, on August 21, 1935, the girl had been in the sanatorium for five months, then all the occurrences to which she testified could have taken place no later than March, 1935. Consequently she testified to nothing after the crucial date of May 14, 1935.

The *ex parte* statement of *Josefina Ruiz* was taken on August 20, 1935. It is denominated Exhibit "D", in Exhibit 5. This contains the following:

"Q. Did you live with Messina when he hired a house of prostitution in La Marina?

A. Yes, sir.

Q. That was a house of prostitution, is that correct?

A. No, sir.

* * * * *

Q. Is Messina's house in Boulevard 81½ a house of prostitution?

A. No, sir, it has never been.

* * * * *

Q. During the time that you have lived there have any prostitutes lived there?

A. Only a girl by the name of Isabel, she is blond-haired, but we took her out of our house when we knew she was a prostitute.

Q. Did a girl by the name of Maria Luisa live in that house too?

A. Yes, sir.

Q. Are these two women prostitutes or whores?

A. Yes, sir.

Q. Did any of these two women give Messina any money out of the money they got from the men?

A. No, sir, they were boarding in our house. Maria Luisa, for example, paid \$3.00 monthly for the rent of a room. Later she knew a Filipino by the name of Bonifacio Alisi, who took this girl to live with him. As they continued living together in the same room, Bonifacio Alisi paid Messina \$25.00 monthly for boarding and room in behalf of Maria Luisa.

Q. Did she receive men in her room?

A. No, sir, except that once I was told by a near neighbor that she took a policeman into her room. When I knew it I immediately took her out of our house.

Q. Do you know whether she was a prostitute?

A. No."

The above is a complete recital of the evidence given at the 1935 hearing. We have made no distinction

between testimonial evidence and *ex parte* hearsay statements.

This review shows that *the entire case was conducted on the supposition that a Filipino was an alien at all times and for all purposes*. There is no evidence of any acts subsequent to May 14, 1935, except the hearsay statement of Ramirez (denied by Burgos) that Burgos told him that Messina's house was a house of prostitution. Even as to this it is only an inference that the supposed statement related to the (then) present time (which would have fixed it *after the date of the warrant*). But such a hearsay statement, if used merely as impeachment, establishes nothing and used as evidence, invalidates the hearing.

We now briefly touch this point.

B. 1935-6 Deportation Proceedings Unfair on Their Face.

1. a. Five *ex parte* statements were used against the appellant in the 1935 hearing. *The makers of two of these were not even called as witnesses*.

In addition there was the hearsay statement of Ramirez as to what Martin Burgos had supposedly said (which Burgos denied saying).

The cases cited on page 16 of appellant's opening brief show that the use of *ex parte* statements is *itself enough to invalidate a hearing*.

b. We may add one observation. At the hearing the witness Maria Luisa Portel testified that even such statements as she did make *ex parte* to the effect that appellant's house had been a house of prostitution,

were made in response to threats. (Ex. 5, p. 6 of hearing transcript.)

“Q. This statement will be read to you in the Spanish language.” (Statement referred to read in Spanish by Examining Officer.) “Is that statement true and correct?”

A. Some of these are true and some untrue. Look, the sheets referred to in that statement were dirty but not stained with semen.

Q. Then why did you declared (sic) that they were dirty with semen?

A. Because you (pointing to stenographer Ramirez) threatened me. It is a lie that men were there with prostitutes and you threatened me stating that you were going to send me to jail.

Q. In what way were you threatened?

A. You (meaning clerk Jose Ramirez) threatened me, that is the truth.

Q. In what way did the stenographer threaten you?

A. The stenographer stated that he was going to send me to jail.

Q. What was he going to send you to jail for?

A. If I don't testify to the truth.”

The acting chairman of the board of review (“Warrant Proceedings”, p. 3) derides this testimony saying:

“In other words, she virtually said that because she had been told that she might be sent to jail if she testified falsely under oath she therefore decided to, and did, testify under oath in part falsely and in part correctly. Such a claim is not understood. . . .”

But exactly this kind of threat was held to be an element invalidating an immigration hearing in *Ex parte Chin Loy Yow*, 223 F. 833, cited on page 16 of appellant's opening brief. There the District Court of Massachusetts said:

(p. 835.) "During that trial Hop Lee was called as a witness and *after a threat by the United States Officers to accuse him of crime if he did not tell the truth*, and a promise of immunity from prosecution if he did tell the truth. . . ." (Italics added.)

Similar statements ("their solemn promise that the law would be carried out"; "the law should take its course"; " * * * let the law take its course, that justice would be done and the majesty of the law upheld")—were held to be elements indicating the *prevalence of a mob spirit* in *Moore v. Dempsey*, 261 U.S. 86, 88-90.

2. At the time both of the enactment and of the effective date of the Philippine Independence Act (1934, 1935) the provision now incorporated in 8 USC 1101(g) *applied only to the criminal prosecutions* under what was first 45 Stats. at L. 1551 (ch. 690), sec. 1 (later 8 USC 180). This act made the language "shall be considered to have been deported in pursuance of law" applicable only "for the purposes of this section."

The 1952 redraft (now 8 USC 1101(g)) for the first time made the provision applicable "for the purpose of this *chapter*" (i.e. the entire chapter on immigration.) So if any weight is to be given to this provision

in the present case, it will again raise the question whether the Philippine Independence Act intended to incorporate then existing immigration laws or also all future laws. (Cf. *Mangoaong v. Boyd*, 205 F. 2d 553, 556.)

It should be added that even in *De Souza v. Barber*, 263 F. 2d 470, 475, which involved an outright alien (Portuguese) rather than a Filipino, this Court cited 8 USC 1101(g) only as a makeweight.

Examination of the statutory language indicates that the section was intended merely to eliminate any distinction between the effects of a deportation and a voluntary departure. This is implied in the clause “left the United States”, and the phrase “irrespective of the source from which the expenses of his transportation were defrayed * * *”.

Viewed in this light, the section is beside the point when the contention is made that the first deportation is illegal and void.

C. No Changes of Law Involved.

At page 17 of appellee’s brief, appellee tries to bring this case within the “change of law” rule of *U.S. ex rel. Steffner v. Carmichael*, 183 F. 2d 19 (lower Court cases holding prohibition of communist membership extended to past membership, disapproved in *Kessler v. Strecker*, 307 U.S. 22).

But there was no change of law in the present case.

1. The rules of fairness were established long before 1935. The following cases, cited in our opening brief, were decided before 1935:

a. **Ex Parte Statements.**

(Cases in Appellant's Br. p. 16)
Ungar v. Seaman (1924), 4 F. 2d 80;
Whitfield v. Hanges (1915), 222 F. 745;
Schenck v. Ward (1934), 6 F.S. 739;
Ex parte McMahon (1924), 1 F. 2d 456;
Ex parte Chin Loy Yow (1915), 223 F. 833;
Gonzales v. Zurbrick (1930), 45 F. 2d 934;
Svarney v. U.S. (1925), 7 F. 2d 515;
Maltez v. Nagle (1928), 27 F. 2d 835.

b. **Constitutional Importance of Interpreter.**

Gonzales v. Zurbrick, supra,

and

Appellant's Opening Brief, p. 12.

2. There has been no change in the law regarding the status of Filipinos. Appellee does not claim that there have been any judicial decisions holding Filipinos to be aliens before 1946. It has cited no such cases. Instead it proffers the administrative holding itself (which did not even consider the point) as establishing the "law". See appellee's brief page 17:

"It cannot be contended that the interpretation of the law between 1934 and 1946 *indicated by appellant's original deportation* was not the correct interpretation". (Italics added.)

Since the decision does not discuss the legal status of Filipinos, it would be no authority from the standpoint of *stare decisis*, even if it had been the holding of an upper Court. (*U.S. v. Mitchell*, 271 U.S. 9, 14; *New v. Oklahoma*, 195 U.S. 252, 256.)

Consequently, the administrative holding of 1935 does not establish any law. The Philippine Independence Act had just become effective at the time, so there were as yet no judicial decisions. If the administrative hearing of 1935 shows anything, it shows an undue anxiety to treat Filipinos as aliens, regardless of the language used by Congress. Ever since judicial decisions have come out, they have been uniformly to the effect that *Filipinos were not aliens before 1946*; that they were to be treated as aliens only for certain purposes; that their arrival in the continental United States prior to the enactment of the Philippine Independence Act did not constitute an "entry"; and that under a statute couched in the present tense acts for which a Filipino might be deported must have been done at a time when he was an alien or was to be treated as an alien for the purposes of those acts.

The ruling in the 1935 deportation cases was not made on the basis of decisions subsequently overruled, but in simple disregard of the act of congress (as later uniformly construed by all Courts) defining the status of Filipinos.

IV. CONCLUSION.

The cases declare that an earlier deportation may be reviewed when there has been "Application of an erroneous rule of law" or "gross miscarriage of justice".

The 1935 deportation proceedings unquestionably applied an erroneous rule of law. We submit they

also entailed a gross miscarriage of justice. It is a gross miscarriage of justice to deport a Filipino as an alien, without even inquiring into his true status, especially when there was no legal testimony that he had committed any deportable act during the period when he "shall be considered as if he were an alien".

In addition to this, the 1935 proceeding was unfair and subject to collateral attack in being based largely on *ex parte* statements; in having an interpreter who assisted the government's investigation, and in having the same official act as prosecutor and judge.

Since the 1935-6 deportation was a "gross miscarriage of justice" and therefore subject to collateral attack, the appellant's arrival in 1956 was a continuation of his previous legal residence and not an "entry". The judgment of the District Court should be reversed with directions to enter judgment for the appellant.

Dated, San Francisco, California,
December 30, 1959.

Respectfully submitted,

NORMAN STILLER,

GEORGE OLSHAUSEN,

Attorneys for Appellant.

No. 16,448

United States Court of Appeals

For the Ninth Circuit

GREGORIO ARCIAGA MESINA,
vs. *Appellant,*

GEORGE K. ROSENBERG, Director of Im-
migration and Naturalization,
Appellee.

Appeal from the United States District Court for the
Southern District of California,
Central Division.

APPELLANT'S PETITION FOR REHEARING
BEFORE THE COURT SITTING EN BANC.

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United States Court of Appeals For the Ninth Circuit

GREGORIO ARCIAGA MESINA,
vs. *Appellant,*

vs.

GEORGE K. ROSENBERG, Director of Im-
migration and Naturalization,
Appellee.

Appeal from the United States District Court for the
Southern District of California,
Central Division.

APPELLANT'S PETITION FOR REHEARING BEFORE THE COURT SITTING EN BANC.

*To the Honorable Richard H. Chambers, Oliver D.
Hamlin, Jr., C. JJ., and William Jameson, D. J.,
Judges of the United States Court of Appeals for
the Ninth Circuit:*

Appellant Gregorio A. Mesina respectfully asks that a rehearing in the above case be ordered before the Court of Appeals of the Ninth Circuit sitting en banc. A rehearing en banc should be granted because there is now an intra-circuit conflict as to the effective date of the Philippine Independence Act, 48 Stats. at L. 456, on which the decisions are evenly divided, 2-2. We give the authorities holding (1) that a rehearing en banc is a proper remedy for this situation and (2) that

the arguments of the present opinion do not give it any logical preference over the two contrary holdings.

**1. REHEARING EN BANC PROPER TO RESOLVE
INTRA-CIRCUIT CONFLICT.**

A. (1) The United States Supreme Court has said that it is the function of the Circuits to resolve intra-circuit conflicts. *Wisniewski v. U.S.*, 353 U.S. 901, 902.

(2) The United States Supreme Court has also said that a rehearing en banc may be proper even where the panel does not doubt the correctness of its decision.

Western Pac. R.R. Corp. v. Western Pac. R.R. Co., 345 U.S. 247,

(p. 262.) "Finally, it is essential to recognize that the question of whether a cause should be heard en banc is an issue which should be considered separate and apart from the question of whether there should be a rehearing by the division. The three judges who decide an appeal may be satisfied as to the correctness of their decision. Yet upon reflection after fully hearing an appeal, they may come to believe that the case is of such significance to the full court that it deserves the attendance of the full court."

B. The Ninth Circuit has held an intra-circuit conflict to be one of the situations calling for a rehearing before the Court of Appeals en banc:

Western Pac. R. R. Corp. v. Western Pac. R. R. Co., 206 F.2d 495, 496.

"It has been the policy of the Court to avoid the duplication of effort, and frustration, delays and

expense to litigants incident to such anomalous procedure *except in situations of a very limited class, namely those in which intra-circuit conflicts appear to have developed*³ . . .”

³(citing) *Hopper v. U. S.*, 142 F.2d 181; *So. Pac. v. Guthrie*, 180 F.2d 295, *id.* 186 F.2d 926.

2. THE PRESENT OPINION ADVANCES NO GROUNDS FOR PREFERENCE OVER OPPOSITE VIEW.

A. As the present opinion recognizes, the previous decisions of this Circuit were 2-1 in favor of fixing the effective date of the Philippine Independence Act (48 Stats. at L.456) at May 14, 1935. With the present decision, the vote now stands at 2-2.

(1) The present opinion mentions the language in *Rabang v. Boyd*, 353 U.S. 427, 431, that the power to exclude Filipinos was exercised “for the period from 1934 to 1946”. This decision does not even refer to the effective date as such of the Philippine Independence Act. Summaries of the briefs in the case appear at 1 L.Ed.2d, 2109-2111. The point was not briefed by the deportee. The Court’s remarks seem to be based on the reference in the government’s brief (1 L.Ed.2d 2111, last par.)—which in turn cites two decisions of this Court, *Gonzales v. Barber*, 207 F.2d 398 and *Mangaoang v. Boyd*, 205 F.2d 553. *Gonzales v. Barber*, 207 F.2d 398, does not touch the point, and *Mangaoang v. Boyd*, 205 F.2d 553 is the other way (as the present opinion recognizes). The present opinion “adhere[s] to the holding of this Court in

Cabebe v. Acheson, 183 F.2d 795, 799” and quotes from the Presidential proclamation of July 4, 1946, 60 Stats. at L.1353. It states as to the two contrary holdings (*Del Guercio v. Gabot*, 161 F. 2d 559; *Mangoang v. Boyd*, 205 F.2d 553) that—“In neither case was a determination of the effective date necessary to the decision”.

(2) *But this was equally true for Cabebe v. Acheson*, 183 F. 2d 795, and applies effectively to the Presidential proclamation of July 4, 1946 (60 Stats. at L.1353). In no instance was the effective date of the Act important to what was being done. (The informal interpretation of the Philippine Independence Act (37 Ops. Atty. Gen. 115) noted in footnote 16 of the opinion, was delivered Feb. 13, 1933, so undoubtedly refers to the (subsequently rejected) Act of Jan. 17, 1933, 47 Stats. at L.761, and not to the Act now under consideration). Consequently, the reasons which the present opinion gives for adopting the authorities fixing May 1, 1934 as the effective date, *apply equally to the holdings on both sides of the question.*

B. On the other hand the present opinion does not mention the significance of the last paragraph of Section 4 of the Act (48 Stats. at L.456) which provides that everything shall revert to its previous status if the *constitution* should be rejected. This could have produced highly anomalous results if the date of acceptance of the Act be taken as earlier than the date of acceptance of the Constitution.

3. IMPORTANCE OF DATE HERE.

By implication, the opinion follows the previous decision in *Mangoang v. Boyd*, 205 F.2d 553, that under the statutes involved here, a Filipino is deportable only for *acts committed when he was no longer an American national*. If the acts charged in 1934 did not satisfy this requirement there was then no authority to deport.

4. CONCLUSION.

This is the fourth time that this Court has been faced with the question of the effective date of the Philippine Independence Act. The question is an important one which keeps recurring.

The four cases have produced two holdings each way.

The situation is clearly one where a hearing en banc should be ordered to settle the law for the Circuit.

Dated, San Francisco, California,

May 1, 1960.

Respectfully submitted,

NORMAN STILLER,

GEORGE OLSHAUSEN,

*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,

May 1, 1960.

GEORGE OLSHAUSEN,

*Of Counsel for Appellant
and Petitioner.*

No. 16450 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEW MOON CHEUNG,

Appellant,

vs.

WILLIAM P. ROGERS, as Attorney General of the United
States, *et al.*,

Appellees.

BRIEF FOR APPELLEES.

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No. 16450

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEW MOON CHEUNG,

Appellant,

vs.

WILLIAM P. ROGERS, as Attorney General of the United
States, *et al.*,

Appellees.

BRIEF FOR APPELLEES.

Jurisdiction.

The District Court had jurisdiction of appellant's action to be declared a national of the United States under the provisions of Section 360(a) of the Immigration and Nationality Act, 66 Stat. 73, 8 U. S. C. A. Section 1503(a). Its judgment [Tr. 24]¹ being a final decision, this Court has jurisdiction of an appeal from such decision pursuant to Title 28, United States Code, Section 1291.

Statement of the Case.

Appellant alleged birth in China on January 28, 1936 [Tr. 1; R. 6], claiming to be the third of five sons born in

¹"Tr." indicates references to the typewritten Transcript of Record; "R." indicates references to the Reporter's Transcript of Proceedings. Exhibits will sometimes be abbreviated "Ex."

China to Lew Shung, his alleged father, and Chew Wai Ying, his alleged mother [Tr. 2; R. 6, 21-23, 43].

Appellant's alleged father was admitted to the United States as a citizen by the Immigration and Naturalization Service on January 25, 1922 [Tr. 9] and his citizenship is not being challenged. Appellant himself was admitted to the United States as a citizen on January 26, 1952 at Honolulu, Hawaii [Tr. 9] and on May 23, 1952 the United States Department of Justice issued to him Certificate of Citizenship No. AA 24951 [Tr. 10; Ex. 1].

By letter dated March 18, 1952 [Ex. H] addressed to the District Director, Immigration and Naturalization Service, Miss Kathleen Parker, who is now a Judge of the Municipal Court but who was then counsel for appellant's parents [R. 229-231], objected to the parents undergoing blood tests because of the expense, but in conclusion stated that:

"Mr. and Mrs. Lew are quite willing to make a sacrifice and incur the additional expense if the Consul will accept a favorable result of the test as sufficient proof of paternity and will issue a travel document to his son, Lew Moon Chung² upon this additional evidence provided it is favorable."

By letter dated April 8, 1952 the American Consulate General, Hong Kong, B. C. C. advised Miss Parker that it was the intention of the Consulate in requesting blood tests of Mr. and Mrs. Lew to conclude its investigation in the case of Lew Moon Cheung (*sic*) and to issue travel documentation to him promptly if the results of the blood testing was favorable [Ex. I].

²The alleged eldest brother of appellant [R. 43]. The two names are apparently spelled the same except for an "e" in appellant's name.

On April 29, 1952 appellant's alleged parents were given blood grouping tests at the United States Public Health Service, San Pedro, California, by Charles F. Butler, a medical or laboratory technician, in connection with the application of appellant's alleged brother, Lew Moon Chung to enter the United States [Ex. C-1; R. 180-185].

By letter dated May 7, 1952 [Ex. J] addressed to the American Consulate General, Hong Kong, B. C. C. Miss Parker stated that immediately upon receipt of the Consulate's letter of April 8, 1952:

“arrangements were made with the Immigration and Naturalization Service for the blood tests which you requested and I have been advised by that Service that the results of the tests are being airmailed to your office.”

On or about December 19, 1956 the Acting District Director Immigration and Naturalization Service entered an order cancelling plaintiff's Certificate of Citizenship No. AA 24951; and on or about March 25, 1957 this order was affirmed by the Acting Regional Commissioner, Southwest Region, Immigration and Naturalization Service [Tr. 7-8].

On April 18, 1957 appellant instituted an action in the court below, seeking a judgment declaring him to be a national of the United States [Tr. 1-6]. He claimed citizenship pursuant to Section 1993, Revised Statutes of the United States [Tr. 2]. On November 27, 1957 appellant was given a blood grouping test by Dr. Michael A. Rubinstein pursuant to order of the District Court [Tr. 22].

During trial appellant's parents testified that they submitted to the blood tests on April 29, 1952 involuntarily because they believed that they were required by law to do so [R. 181-182, 185]. The trial court admitted evidence

showing the results of the blood grouping tests given appellant [Ex. D; R. 103] as well as evidence showing the results of the blood grouping tests of appellant's alleged parents [R. 98, 254; Sub-exhibits A, B, C, D, E, and F of Interrogatories contained in Ex. C; Exs. E-1, E-2, E-3, F-1, F-2, F-3, and G].³ These results, insofar as they are pertinent to the instant case, are:

Alleged father:	Lew Shung	AB
Alleged mother:	Chew Wai Ying	B
Appellant:	Lew Moon Cheung	O

³Exhibit C contains, among other things, the Interrogatories and Cross-Interrogatories propounded to Charles F. Butler. Attached to the Interrogatories as Sub-exhibits A, B, and C are photostats of forms relating to the blood grouping tests given to appellant's alleged father, Lew Shung ("Shung, Lew" on the forms). Attached to the Interrogatories as Sub-exhibits D, E, and F are photostats of forms relating to the blood grouping tests given to appellant's alleged mother, Chew Wai Ying ("Ying, Chew Wai" on the forms).

Exhibits E-1, E-2, and E-3 are forms from the records of the United States Public Health Service [R. 201] relating to blood grouping tests given to appellant's alleged father, Lew Shung.

Exhibits F-1, F-2, and F-3 are forms from the records of the United States Public Health Service [R. 202] relating to blood grouping tests given to appellant's alleged mother, Chew Wai Ying.

Exhibit G consists of ribbon copies of the results of the blood grouping tests for both of appellant's alleged parents mailed on May 1, 1952, to the Immigration and Naturalization Service. The Court will note that Sub-exhibits A, B, C, D, E, and F attached to the Interrogatories are photostats of Exhibits E-1, E-2, E-3 (without letter of transmittal), F-1, F-2, and F-3 (without letter of transmittal) respectively; and that Exhibit G consists of the ribbon and signed copies of the same documents of which both Exhibits E-3 and F-3 are composed.

Counsel for appellant did not object to the admission of Exhibit C into evidence [R. 98] although he thereafter moved to strike this exhibit [R. 154, 257-259]. No objection was interposed to the admission of Exhibits E-1, E-2, F-1, and F-2 [R. 254]. At first E-3 and F-3 were objected to only on the ground that they were carbons [R. 254], although later there was a vague reference to authentication [R. 255]. No objection was made to Exhibit G [R. 254], although there was later a vague reference to authentication [R. 255].

Exhibit E-1 was admitted [R. 254], although the Clerk of Court omitted to so mark it.

After trial the District Court filed its Memorandum of Opinion [Tr. 12-16] and entered its Findings of Fact, Conclusions of Law and Judgment [Tr. 20-24], finding, inter alia, that based upon the blood tests set forth above, appellant "cannot possibly be the child of his alleged father" [Finding of Facts VI and VII; Tr. 21-22] and denying the relief prayed for in appellant's Complaint [Tr. 24].

Questions Presented.

1. Did the District Court err in admitting in evidence results of the blood grouping tests given appellant's alleged parents on April 29, 1952?
2. Did the Government rebut appellant's *prima facie* case by clear, unequivocal, and convincing evidence?

Statutes Involved.

Section 360(a) of the Immigration and Nationality Act, 66 Stat. 273, 8 U. S. C. A. Section 503(a) provides in pertinent part:

"Sec. 360. (a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States,

* * *

Section 1993 of the Revised Statutes of the United States, as amended by Section 1 of the Act of May 24, 1934, 48 Stat. 797, provides in pertinent part:

“SEC. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. * * *”

Title 28, United States Code, Section 1732(a) provides:

“(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

“All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

“The term ‘business,’ as used in this section, includes business, profession, occupation, and calling of every kind.”

ARGUMENT.

I.

The Results of the Blood Grouping Tests Given Appellant's Alleged Parents Were Properly Admitted in Evidence.

A. The Results of These Tests Were Admissible as Records Made in the Regular Course of Business.

Appellant contends that on April 29, 1952 it was not the usual course of business of the Public Health Service to take blood tests *at the request of the Immigration and Naturalization Service* (Br. 8). This contention, in the form advanced by appellant, even if sustained, would not render the results of the tests in the instant case inadmissible under the standards laid down in *Palmer v. Hoffman*, 318 U. S. 109 (1943), The particular agency for whom blood tests are performed would in no way affect their "probability of trustworthiness" (318 U. S. at pp. 113-114); and certainly the conduct of blood grouping tests is within the "inherent nature" (318 U. S. at p. 115) of a public health service.

In the case at bar, however, Mrs. Catherine Fay Wood, who at the time of trial had been registrar of the United States Public Health Service at San Pedro, California for ten years [R. 200-201], testified that it was the business of the Public Health Service in April, 1952 to take blood tests on behalf of the Immigration and Naturalization Service when requested; that blood test equipment had been available at the San Pedro office since about 1949; and that from that time on the office had been testing blood on behalf of agencies that requested it [R. 215-216, 218-219].

Mrs. Wood also identified Exhibits E-1, E-2, F-1, and F-2 as forms regularly used by the Public Health Service in San Pedro [R. 204-205, 209-210].⁴ She identified the handwriting appearing on each of these exhibits [R. 205-206, 209-211] and described the purposes of the forms [R. 204-205, 209]. In addition, she described the procedure which was employed on April 29, 1952 for requesting and obtaining a blood test at the San Pedro United States Public Health Service [R. 206-207, 213-215, 220, 222-226].

Clearly on April 29, 1952 it was not only in the regular course of business of the United States Public Health Service at San Pedro to conduct blood tests generally and to record the results thereof, but also to do so when requested by the Immigration and Naturalization Service (Title 28, U. S. Code, Sec. 1732; *Washington Coca-Cola Bottling Works v. Tawney*, 233 F. 2d 353 (Dist. Col. Cir. 1956); *Medina v. Erickson*, 226 F. 2d 475, 482-483 (9th Cir. 1955), cert. den. 351 U. S. 910; *Wheeler v. United States*, 211 F. 2d 19 (Dist. Col. Cir. 1953), cert. den. 347 U. S. 1019; *Stegemann v. Miami Beach Boat Slips*, 213 F. 2d 561 (5th Cir. 1954)).

Appellant urges that Exhibits E-3 and F-3 which set forth the results of the blood tests are not sufficiently identified, since they do not bear any initials (Br. 9-10). However, Exhibits E-1, E-2, and E-3 all bear the name "Shung, Lew" and Exhibits F-1, F-2, and F-3 all bear the name "Ying, Chew Wai." Identity of person is pre-

⁴The Court will note that Exhibits E-1, E-2, F-1, and F-2 are official forms and that Exhibits E-2 and F-2 (Standard Form 514-b) have printed on them under the heading "Check Exam. Requested," *inter alia*, the following: "Blood Type" and "RH Factor."

sumed from identity of name (*Stebbins v. Duncan*, 108 U. S. 32, 46-47 (1882)). This presumption is strengthened by the fact that the names of appellant's parents are not common, and by the further fact that they admitted having taken a blood test at the United States Public Health Service at San Pedro, California on April 29, 1952 [R. 180, 184].

Moreover, Mr. Butler placed on Exhibits E-2 and F-2, the official form for recording the results of the tests, his initials, the date, and the phrase "see typed sheet" [R. 206, 210-211; Ex. C-1, pp. 2-4].⁵ Mrs. Wood testified that the results of the blood tests were typed in this case because they were so long [R. 222] and there was too much to get on the "pink slip"⁶ [R. 223-224]; and that the typed sheet in such cases was customarily stapled to the "pink slip" [R. 224]. It will not be presumed that an error was made in attaching the results of the blood tests of appellant's alleged parents. Rather, it will be presumed that Government personnel properly performed their duties (*United States v. Chemical Foundation*, 272 U. S. 1, 14-15 (1926); *Pasadena Research Laboratories v. United States*, 169 F. 2d 375, 381-382 (9th Cir. 1948), cert. den. 335 U. S. 853).

As further authentication the signature of Dr. Daniel Rose, the Deputy Medical Officer in Charge, was placed on the ribbon copies of the results of the blood tests on May 1, 1952 [Ex. G; R. 208].

⁵Photostatic copies of Exhibits E-2 and F-2 were attached to the Interrogatories [Ex. C] as Sub-exhibits B and E respectively.

⁶The pink slips are Exhibits E-2 and F-2.

B. The Results of These Tests Were Admissible as Official Records.

While records of the results of the blood tests of appellant's alleged parents may not be within the scope of Title 28, United States Code, Section 1733 (*Hartzog v. United States*, 217 F. 2d 706 (4th Cir. 1954); but see *Desimone v. United States*, 227 F. 2d 864 (9th Cir. 1955); and compare *Southard v. United States*, 218 F. 2d 943 (9th Cir. 1955)); Exhibits E-1, E-2, E-3, F-1, F-2, and F-3 are clearly official records within the meaning of Rule 44, Federal Rules of Civil Procedure (*United States v. Conti*, 119 F. 2d 652, 656 (1st Cir. 1941); 5 Moore's Federal Practice Secs. 44.02 and 44.03).⁷

Instead of offering duly authenticated copies under seal as provided for in Rule 44(a), the appellees presented the original records authenticated by the testimony of Mrs. Wood, the custodian of the records, [R. 204-206, 209-211]. Appellees also presented the testimony of Mr. Butler, *the person who conducted the blood grouping tests and prepared the record of the results*, who authenticated photostatic copies of the records [Ex. C-1].⁸ This is sufficient to render them admissible (*Brenci v. United States*, 175 F. 2d 90 (1st Cir. 1949)).

⁷In 5 Moore's Federal Practice, Section 44.02, the author states (p. 1515):

"... If a paper represents work done by a person in the employment of the government in the course of the performance of the duties of his position, it is 'official.'"

⁸The qualification in the witness's answers to questions as to whether he prepared Sub-exhibits C and F attached to the Interrogatories: (Yes, assuming that Exhibit C is the original attachment to Exhibit B" [Ex. C-1, p. 3]; "Yes, assuming that the Exhibit F is the original attachment to Exhibit E" [Ex. C-1, p. 4]) is of little significance. The witness was merely being careful since he was testifying from a photostat rather than the original typed copy.

C. Appellant's Alleged Parents Voluntarily Submitted to These Tests.

From correspondence between Miss Parker, who at the time represented appellant's alleged parents as counsel [R. 230-231], the Immigration and Naturalization Service, and the American Consulate General at Hong Kong [Exs. H, I, and J], it is clear that appellant's parents voluntarily submitted to the blood grouping tests given them on April 29, 1952 in order to facilitate the entry of appellant's alleged brother into the United States. Appellant's parents admitted that they submitted to the tests in connection with the application of appellant's alleged brother to come to the United States [R. 181-184]; but claimed that they did so involuntarily because they believed that they were required by law to submit to the tests [R. 181-182, 185]. The District Court did not accept their testimony⁹; and it was not required to do so, even though such testimony may have been unimpeached or not directly contradicted (*Quock Ting v. United States*, 140 U. S. 417, 420 (1891); *Wong Sho Ging v. Brownell*, 218 F. 2d 910 (9th Cir. 1955); *Mar Gong v. Brownell*, 209 F. 2d 448, 449 (9th Cir. 1954); *N. L. R. B. v. Howell Chevrolet Co.*, 204 F. 2d 79, 86 (9th Cir. 1953), affirmed *sub nom Howell Chevrolet Co. v. N. L. R. B.*, 346 U. S. 482).

Moreover, the Supreme Court held in the case of *Breithaupt v. Abram*, 352 U. S. 432 (1957) that the withdrawal of blood by a skilled technician, *even without consent*, is not violative of any constitutional right. In the

⁹In its Memorandum of Opinion the Court below declared [Tr. 16]:

“From the evidence before it, the court believes the plaintiff's alleged parents voluntarily submitted themselves for blood group testing without protest on behalf of the claimed brother.”
See also Finding of Fact VIII [Tr. 22].

absence of some valid constitutional objection, all relevant evidence will be considered by the Court, no matter how obtained (*Ohmstead v. United States*, 277 U. S. 438, 466-469 (1927); *Joon Sui Noon v. United States*, 76 F. 2d 249 (8th Cir. 1935); *United States v. Lee Hee*, 60 F. 2d 924 (2d Cir. 1932); *United States v. Wainer*, 49 F. 2d 789 (W. D. Pa. 1931); *In re Dooley*, 42 F. 2d 562 (S. D. N. Y. 1930)).

II.

The Government Rebutted Appellant's Prima Facie Case by Clear, Unequivocal, and Convincing Evidence.

A. The Blood Grouping Tests Made of Appellant's Alleged Parents Were Reliable.

Appellant's attack upon the qualifications of Charles F. Butler to perform the blood grouping tests of appellant's alleged parents is without merit. Mr. Butler was a medical technician and at the time of his deposition upon written Interrogatories [Exs. C, C-1, and C-2] had been so employed for twenty-two years [Ex. C-1, pp. 1-2]. He received training in the conduct of blood tests at the National Institute of Health and in the United States Army [Ex. C-1, p. 2]. On April 29, 1952 Mr. Butler had had eight years experience in conducting blood tests and had made about 5000 agglutination tests.¹⁰

The Court will note that blood tests of the A-B-O system are decisive in the instant case [Tr. 22]. This system

¹⁰The fact that Mr. Butler did not hold a license as a laboratory technician would seem to be unimportant in view of his many years of experience and his civil service position.

was the earliest to be discovered,¹¹ and is used in classifying blood for transfusions (see, Wiener, "Blood Groups and Transfusion," 3d Ed., Chap. IV).

Dr. Michael A. Rubinstein, whose qualifications as an expert hematologist are unimpeachable [R. 99-102] compared testing in the A-B-O system and other systems as follows [R. 116]:

"The performance of AB testing is *most reliable* and the conclusions drawn from this test are more reliable as compared to other blood testing, the reason being that the *technique is simple, doesn't require any special training as compared to other testing*, as, for example, M and N and H groups, and also because the serum, *the testing seras available for this blood group testing are more reliable* and are not subject to deterioration as other blood testing sera are."

With respect to the qualifications of a technician to conduct blood grouping tests of the A-B-O system, Dr. Rubinstein said [R. 117]:

"Usually in big hospitals where the life and welfare of patients depends upon the accuracy of testing and blood transfusion matters and so on, *we rely in AB and O testing entirely on qualified technicians* and we do not require a hematologist to do the test because, for the reasons as I said, *they are reliable and simple and accurate tests.*

¹¹The discovery of the A-B-O blood grouping system was reported by Dr. Karl Landsteiner in 1901. The M-N system was discovered by Landsteiner and Levine in 1927. Drs. Landsteiner and Wiener announced the discovery of the Rh factor in January, 1940 (see Schatkin, "Disputed Paternity Proceedings," 3d Ed., pp. 164, 166-167, 171). As of 1952 more than eight independent blood group systems had been identified (see "Medicolegal Application of Blood Grouping Tests," The Journal of the American Medical Association, June 14, 1952, Vol. 149, pp. 699-706).

The Court: Then is it your opinion a technician who has only had experience in a laboratory over a period of years could be qualified to take a blood test like this?

The Witness: A blood test for A and B and O, yes. Any certified technician, all technologists will be entrusted with such tests, and I will accept such tests reported by a qualified and certified technologist.

The Court: We can rely upon the results?

The Witness: Yes. In this testing of A, B, and O. With RH, I would like to do it myself." (Emphasis added.)

The Court will also note that the crucial result obtained by Mr. Butler was the blood type of appellant's alleged father: AB.¹² Where an AB result is obtained, there is no necessity to recheck because there is a positive result as to the presence of both A and B factors; whereas, if a negative result is obtained, such as type O, which indicates an absence of both A and B factors, rechecking is necessary "because there may be cases where A and B are very weak or the serum is not potent enough to demonstrate the presence of A and B" [R. 121-122]. But where positive results as to both A and B are obtained, the potency of the serum is unimportant; since if positive results are obtained where the serum is weak, the proof is even stronger that the person is of type AB [R. 122-123].

The testimony of Dr. Rubinstein as to the reliability and simplicity of the A-B-O tests and the qualifications of

¹²Since, as will be hereafter more fully discussed, a parent with blood type AB cannot have a child of type O, the results of the test of appellant's alleged mother is immaterial.

a laboratory technician to perform them is almost identical with that of Dr. Alexander S. Wiener in *Matter of D-W-O and D-W-H*, 5 I & N Dec. 351. As mentioned above (Footnote 11) Dr. Wiener is co-discoverer of the Rh factor, and is indisputably one of the leading hematologists in the United States. The following quotations are illustrative [5 I & N Dec. pp. 360-361]:

“Dr. Wiener testified that A-B-O, M-N and Rh blood systems are completely separate, independent, unrelated blood group systems, that there are a number of others (described in Ex. B-2), but that the less known systems have not yet any practical medicolegal significance. He testified that *it is immaterial whether parentage is disproved by one, two or all three blood tests, that any of the three tests is equally valid in disproving parentage.* * * *

“Dr. Wiener testified that *an ordinary hospital technician, qualified to perform A-B-O tests for transfusion purposes is competent to perform A-B-O tests for all purposes.* He testified that he has *no reason to doubt that the United States Public Health Service technician who made the blood grouping tests in this case to be competent to determine A-B-O classifications.* He does doubt that this same technician is competent to perform M-N tests, because an M-N test to be reliable should be performed only by persons who do those tests frequently and regularly.
* * *

“* * * Dr. Wiener testified that the only discrepancies or errors he has found in the United States Public Health Service tests have involved M-N tests and *never A-B-O tests.*” (Emphasis added.) * * *

“* * * He stated that the fact that the person makes an error in an M-N test does not necessarily

shake confidence in his A-B-O tests, that errors in M-N tests are to be anticipated, because of the nature of the tests. He stated that *there is hardly any mechanical difficulty in making A-B-O tests*, that potent serums for this test are readily available on the open market and, if produced by one of the recognized serum producing firms, are certified by the National Institute of Health." (Emphasis added.)

Appellant relies upon rules for the conduct of blood tests set forth in various articles and texts (Br. 17-18, 20-21). These rules, while useful as general guides, do not distinguish between the various systems of blood tests and the relative difficulty of performing each of them, as did Drs. Rubinstein and Wiener. Nor do the authorities relied upon by appellant differentiate between positive and negative results. The crucial question is not whether general guides for the conduct of all systems of blood tests were complied with, but *whether the particular tests here involved were reliably conducted*.

Irrespective of whether an unfavorable inference may be drawn against appellant because he failed to offer any evidence to disprove the results of the tests offered by the Government (see, *Matter of D-W-O and D-W-H*, *supra*, cited with approval by this Court in *Et Min Ng v. Brownell*, 258 F. 2d 304 (9th Cir. 1958) at p. 308 (footnote 9), the blood grouping tests performed by Mr. Butler were clearly reliable, rendering such an inference unnecessary. This reliability is reinforced by the presumption of regularity in favor of the accuracy of blood tests in the absence of evidence that such tests call for unusual medical skill to make or interpret (*Wong Fuey Ying v. Dulles*, 137 Fed. Supp. 470, 472 (D. C. Mass. 1956)).

B. Appellant Cannot Possibly Be the Child of His Alleged Father.

The pertinent results of the blood grouping tests of appellant and his alleged parents are as follows:

Alleged father: Lew Shung AB

Alleged mother: Chew Wai Ying B

Appellant: Lew Moon Cheung O

Based upon the foregoing results Dr. Rubinstein testified that it was impossible for appellant to be the child of his alleged father [R. 112-115]. His reasons were concisely summarized as follows [R. 115]:

“... a person of Group O *cannot* be a blood child of a person of Group AB, and if one of the parents is AB, it cannot be the blood child of this couple.” (Emphasis added.)

The above rule is universally recognized by all medical authorities (see, for example, “Medicolegal Application of Blood Grouping Tests,” *supra*; Schatkin, “Disputed Paternity Proceedings,” *supra*, at p. 168). In “Medicolegal Application of Blood Grouping Tests,” *supra*, it is unequivocally declared:

“... A parent with blood of group AB *cannot* have a child with blood of group O, and a parent of group O cannot have a child of group AB.” (Emphasis added.)

Blood grouping tests of the A-B-O system excluding paternity should be given conclusive weight. As the Commissioners on Uniform State Laws said in their Prefatory Note to the Uniform Act on Blood Tests to Determine Paternity (see, 9 Uniform Laws Annotated, 1955 Cumulative Annual Pocket Part, pp. 13-14):

“As to the make-up of the blood, the testing process is reasonably simple. *It is practically the same*

thing in which the 11 million or more men were tested in determining blood types in the service. It is the same kind of test made of the blood of donors to the Red Cross and hospital blood banks. Consequently, this is one of the few classes of cases in which judgment of court may be absolutely right by use of science. In this kind of a situation it seems intolerable for a court to permit an opposite result to be reached when the judgment may scientifically be one of complete accuracy. For a court to permit the establishment of paternity in cases where it is scientifically impossible to arrive at that result would seem to be a great travesty on justice. * * *” (Emphasis added.)

And in Schatkin, “Disputed Paternity Proceedings,” *supra*, the author declares (p. 234):

“As far as the accuracy, reliability, dependability—even infallibility—of the test are concerned, there is no longer any controversy. *The result of the test is universally accepted by distinguished scientific and medical authority.* There is, in fact, no living authority of repute, medical or legal, who may be cited adversely.” (Emphasis added.)

The California decisions holding blood tests excluding paternity not to be conclusive (*Arais v. Kalensnikoff*, 10 Cal. 2d 428, 74 P. 2d 1043, 115 A. L. R. 163; *Berry v. Chaplin*, 74 Cal. App. 2d 652, 169 P. 2d 442) have been severely criticized by both courts and legal writers (*Gilpin v. Gilpin*, 94 N. Y. S. 2d 706, 709, 197 Misc. Rep. 319, 322 (1950); Schatkin, “Disputed Paternity Proceedings,” *supra*, at pp. 250-263; Britt, “Blood-Grouping Tests and More ‘Cultural Lag’ ” 22 Minn. L. Rev. 836, 837 (1938); Note, 39 Calif. L. Rev. 277 (1951)). And other courts

have long held blood grouping tests excluding paternity to be conclusive (*Jordan v. Mace*, 144 Me. 351, 69 A. 2d 670 (1949); *Saks v. Saks*, 71 N. Y. S. 2d 797, 189 Misc. 667 (1947); *Cuneo v. Cuneo*, 96 N. Y. S. 2d 899, 198 Misc. Rep. 240 (1950); *Cortese v. Cortese*, 10 N. Y. Supp. 152, 76 A. 2d 17 (1950); *Clark v. Rysedorph*, 118 N. Y. S. 2d 103, 281 App. Div. 121 (1952); *Ross v. Marx*, 90 A. 2d 545, 21 N. J. Super. 95; See also: "A Survey of Blood Group Decisions and Legislation in the American Law of Evidence," 16 So. Cal. L. Rev. 161; Note: 34 Cornell L. Q. 72 (1948); Note, 26 Calif. L. Rev. 456 (1938)).

Appellant relies upon the California indisputable presumption of legitimacy to overcome the results of the blood grouping tests (Cal. Code Civ. Proc., Sec. 1962.5; Br. 24). This presumption manifestly has no application to a decision determining whether a child born abroad acquired citizenship under a federal statute. The doctrine enunciated in *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), 114 A. L. R. 1487, that a federal court will apply the substantive law of the state wherein it sits (see also, *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941); *Guaranty Trust Co. v. York*, 326 U. S. 99 (1940)) has generally been limited to cases arising out of diversity of citizenship; and in the interpretation and application of federal statutes, such as the statute here involved federal rather than local law governs. (*United States v. Standard Oil Co.*, 332 U. S. 301 (1947); *Holmberg v. Armbrrecht*, 327 U. S. 392 (1946); *Clearfield Trust Co. v. United States*, 318 U. S. 363 (1943); *Wragg v. Federal Land Bank*, 317 U. S. 325, 328-329 (1943); *Sola Electric Co. v. Jefferson Co.* 317 U. S. 173, 176 (1942); *D'oench, Duhme & Co. v. F. D. I. C.*, 315 U. S.

447, 455-456 (1942); *Board of Comm'rs v. United States*, 308 U. S. 343 (1939); *United States v. Matthews*, 244 F. 2d 626 (9th Cir. 1957).) Similarly, federal law should govern the weight to be accorded blood tests excluding paternity.¹³ It would be an anomaly if a child born abroad would be able to establish his United States citizenship in a state where blood tests excluding paternity are not conclusive, while not being able to do so in a state where such tests are given conclusive effect.

Moreover, it is doubtful that the California indisputable presumption is applicable to a child *not born in California*. Certainly, it does not apply to a child born abroad claiming American citizenship; for generally in such cases there is testimony that the purported father and mother cohabited. The question in these cases is not one of legitimacy but of identity (*Matter of L-C-S*, 6 I & N Dec. 212 (July 19, 1954)).

C. The District Court Was Satisfied That Appellant's Prima Facie Case Had Been Rebutted by Clear, Convincing, and Unequivocal Evidence.

Appellant relies upon the recent decision of this Court in *Lee Hong Lung v. Dulles*, 261 F. 2d 719 (9th Cir. 1958), holding that where a person, over a long period of years, had acted in reliance upon the decision of a Board of Special Inquiry admitting him as a citizen of the United States; fraud or error which would warrant disregard of such decision must be established by evidence which is

¹³In *United States v. Shaughnessy*, 220 F. 2d 537 (2d Cir., 1955), *cert. den.* 350 U. S. 847; and *Lue Chow Kon v. Brownell*, 220 F. 2d 187 (2d Cir., 1955), holding blood tests excluding paternity conclusive under New York law, the conflict of laws question was not discussed.

clear, unequivocal, and convincing.¹⁴ This decision is of no aid to appellant because the trial court was satisfied that appellant's *prima facie* case had been rebutted beyond any doubt.

While the findings¹⁵ of the court below do not explicitly set forth the standard of proof which it required, its Memorandum of Opinion does so. An appellate court may resort to an oral or written opinion for certain purposes (*Loeb v. Columbia Township Trustees*, 179 U. S. 472, 481-485 (1950); *In re Forstner Chain Corporation*, 177 F. 2d 572, 578, footnote 2 (1st Cir. 1949)); and this Court in similar cases has considered opinions to determine whether the trial court in making its findings did so in reliance upon considerations which should have carried no weight in the particular case (*Mar. Gong v. Brownell*, 209 F. 2d 448, 450 (9th Cir. 1950)) and to determine the standard of proof applied by the District Court (*Ly Sherw v. Dulles*, 219 F. 2d 413, 416 (9th Cir. 1954)).

In the case at bar the standard of proof applied by the Court below is clearly set forth in its opinion [Tr. 18]:

“* * * If there were any doubt whatsoever in the court's mind that these tests were unreliable the court would disregard the tests, but the court is of the

¹⁴More than thirty-three years elapsed between the date Lee Hong Lung was admitted by a Board of Special Inquiry on January 7, 1924, and the date his citizenship was challenged in April, 1957 (261 F. 2d at p. 720); while less than five years elapsed between the date appellant was first admitted to the United States as a citizen on January 26, 1952 [Tr. 9], and the date his citizenship was first challenged on September 17, 1956 [Tr. 7]. Appellees will nevertheless assume that the “clear, convincing, and unequivocal” evidence rule applies to the instant case.

¹⁵The present judgment was entered on November 4, 1958, before this Court rendered the *Lee Hon Lung* decision on November 10, 1958.

opinion the tests were reliably and carefully conducted; that the plaintiff has it within his power to establish a different finding if one could be so established; that plaintiff's failure and the failure and refusal of his alleged parents to submit themselves for comparison blood grouping tests serves only to establish the fact that new tests would substantiate *the fact already established—that plaintiff cannot possible (sic) be the son of these claimed parents.* It appears to the court that the science of blood grouping has advanced so far that *it can be relied upon to establish impossibility of paternity.*" (Emphasis added.)

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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Attorneys for Appellees.*

No. 16452

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNEST KING BRAMBLETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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No. 16452
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ERNEST KING BRAMBLETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

Appellee brought action in the court below seeking forfeitures and damages under the False Claims Act, Title 31, United States Code, Section 231, *et seq.* and restitution of monies wrongfully received [Tr. 2-4; 15-20; 139-150; 175].¹

The District Court had jurisdiction of appellant's action under the False Claims Act pursuant to the provisions of Title 31, United States Code, Section 232(A). The District Court had jurisdiction of appellant's action for resti-

¹"Tr" indicates references to the Clerk's Transcript of Record, which apparently is being considered in its original form. "R" indicates references to Reporter's Transcript of Proceedings. "Ex" or "Exs" refers to exhibits received in evidence, sometimes followed by the page numbers of the exhibit. "Br" indicates references to Appellant's Opening Brief.

tution of monies wrongfully received pursuant to the provisions of Title 28, United States Code, Section 1345.

The judgment of the court below [Tr. 374] being a final decision, this court has jurisdiction of an appeal from such decision pursuant to Title 28, United States Code, Section 1291.

Statement of the Case.

Appellee brought action in the court below against appellant and his wife, Lois Bramblett,² seeking forfeitures and damages under the False Claims Act and restitution of monies wrongfully received [Tr. 2-4; 15-20; 139-150; 175]. After trial, the District Court found, *inter alia*, that while a member of Congress appellant contrived a fraudulent scheme whereby he represented to the Disbursing Officer of the House of Representatives that he had employed Margaret M. Swanson, Olga Hardaway, and Lillian South to work as his clerks; when he knew at the time, and continued to know during the periods that these persons remained on the payroll of the Disbursing Officer, that they were not to work as his clerks as represented, during all or a part of the periods for which salary checks were issued them by the Treasurer of the United States, but were to be placed on the payroll for the purpose of diverting all or a part of their salary payments to appellant's own use [Finding of Fact III, Tr. 365].

The court below found that in furtherance of this fraudulent scheme appellant submitted to the Disbursing Office of the House of Representatives various Clerk-Hire Allowance forms, naming Margaret M. Swanson,

²Appellant's wife, Lois Bramblett, was added as a party defendant in the Second Amended Complaint [Tr. 139-150].

Olga Hardaway, and Lillian South as clerks and that the submission of the initial Clerk-Hire Allowance form for each of these persons caused such person to be placed on the payroll of the Disbursing Office and entitled her to receive the salary designated on the form, which salary continued until it was in some manner revoked or modified by appellant [Findings of Fact IV and V, Tr. 365-366].

With respect to Margaret M. Swanson, the District Court found, among other things, that appellant continued her on the payroll of the Disbursing Office of the House of Representatives from September 1, 1949 through December 31, 1950 as his clerk; that during this period Mrs. Swanson performed no work whatever for appellant as his clerk, as appellant well knew; and that the proceeds of all her salary checks in the total amount of \$7,647.12 were transferred to appellant for his own use [Finding of Fact VI, Tr. 366-367].

With respect to Olga Hardaway, the District Court found, among other things, that appellant continued her on the payroll of the Disbursing Office of the House of Representatives from November 1, 1950 through November 30, 1951 as his clerk; that during the months of November, 1950, December, 1950, and January, 1951, Mrs. Hardaway performed no work for appellant as his clerk; that commencing about February 1, 1951, she commenced performing various miscellaneous duties for appellant, in addition to her full-time, salaried employment with a newspaper, the Pacific Grove Tribune; and that some of her salary checks or the proceeds thereof in the amount of \$934.96 were transferred to appellant for his own use [Finding of Fact X, Tr. 368].

With respect to Lillian South, the District Court found, among other things, that appellant continued her on the payroll of the Disbursing Office of the House of Representatives from January 3, 1947 through December 31, 1947 as his clerk; that from January 3, 1947 until about August 1, 1947 Mrs. South performed no work for appellant as his clerk, although occasionally she assisted her own husband in editing speeches and entertained constituents; and that the proceeds of some of her salary checks, in the amount of \$570 were transferred to appellant for his own use [Finding of Fact XIV, Tr. 369-370].

The court below found that appellant presented and caused to be presented false, fictitious, and fraudulent claims with respect to his purported employment of Margaret M. Swanson and Olga Hardaway [Findings of Fact VII and XI; Conclusions of Law III and IV, Tr. 367, 368-369, 371]; that such claim with respect to Mrs. Swanson was a continuing one, commencing when the Clerk-Hire Allowance form for her was submitted and continuing until her name was removed from the payroll [Finding of Fact VII, Tr. 367]; and that during the periods that Margaret M. Swanson, Olga Hardaway, and Lillian South were on the payroll of the Disbursing Office of the House of Representatives, appellant wrongfully, illegally, and fraudulently received proceeds from their respective salary checks, monies which belonged to the Government of the United States [Findings of Fact IX, XII, and XV, Tr. 367-368, 369, 370].

The District Court concluded that appellee was not barred by the limitations contained in Title 31, United States Code, Section 235, from recovering forfeitures against appellant pursuant to the provisions of the False Claims Act by reason of his purported employment of

Margaret M. Swanson and Olga Hardaway; that appellee was barred by said limitations statute from recovering from appellant pursuant to the provisions of the False Claims Act, double the amount of damages which the United States sustained before November 1, 1950, the original complaint having been filed on October 31, 1956; but that appellee was not barred by said limitations statute from recovering against the appellant pursuant to the provisions of the False Claims Act double the amount of damages which the United States sustained on and after November 1, 1950 [Conclusions of Law V, VI, and VII; Tr. 371-372]. The District Court concluded that appellee was not barred by any limitations statute from obtaining restitution from the appellant of monies wrongfully received by him at any time [Conclusion of Law IX, Tr. 372].

Judgment was entered in favor of the appellee and against appellant in the sum of \$15,008.32, plus interest on the sum of \$6,725.84 at the rate of 7% per annum from January 1, 1951 until the day of entry of judgment, plus interest on the sum of \$570 from January 1, 1948 until the day of entry of judgment [Tr. 374]. Judgment was entered in favor of appellant's wife [Tr. 374].

Questions Presented.

1. Is the judgment of the District Court supported by sufficient evidence?

2. Was the Government barred by statutes of limitations from obtaining the relief granted by the District Court?

Statutes Involved.

Title 31, United States Code, Section 231, provides in part:

“Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, * * *

“* * * shall forfeit and pay to the United States the sum of \$2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.”³

Title 31, United States Code, Section 232(A), provides:

“(A) The several district courts of the United States, the several district courts of the Territories

³Since the Code provisions have not been enacted into positive law, pertinent portions of Sections 3490 and 5438 of the Revised Statutes are quoted below:

“R. S. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title ‘Crimes,’ shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the

of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.”⁴

Title 31, United States Code, Section 235, provides:

“Every such suit shall be commenced with six years from the commission of the act, and not afterward.”⁵

Title 28, United States Code, Section 1345, provides:

“Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.”

doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.”

“R. S. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, * * * shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars.”

⁴Section 3491, Revised Statutes.

⁵Section 3494, Revised Statutes.

ARGUMENT.

I.

THE JUDGMENT OF THE DISTRICT COURT IS SUPPORTED BY SUFFICIENT EVIDENCE.

A. Scope of Appellate Review.

Appellant's attack upon the sufficiency of the evidence based principally upon his attempt to impugn the credibility of witnesses for the Government (Br. 9-20) must be appraised in the light of Rule 52(a), Federal Rules of Civil Procedure, which provides *inter alia* that "Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." (*United States v. Yellow Cab Co.*, 338 U. S. 338 (1949); *Lew Wah Fook v. Brownell*, 218 F. 2d 924 (9th Cir. 1955), cert. den. 349 U. S. 944; *Dickinson v. Burnham*, 197 F. 2d 973 (2d Cir. 1952), cert. den. 344 U. S. 875; *Milgram v. Loew's, Inc.*, 192 F. 2d 579 (3rd Cir. 1951), cert. den. 343 U. S. 929; *Paramount Pest Control Service v. Brewer*, 177 F. 2d 564, 567 (9th Cir. 1949); *Connolly v. Gishwiller*, 162 F. 2d 428 (7th Cir. 1947); *Union Producing Co. v. White*, 157 F. 2d 254 (5th Cir. 1946), cert. den. 329 U. S. 792; see also, *United States v. Gypsum Co.*, 333 U. S. 364, 394-395 (1948); *United States v. Comstock Extension Mining Co.*, 214 F. 2d 400, 402-403 (9th Cir. 1954).)

In *Lew Wah Fook v. Brownell*, *supra*, Judge Stephens, after quoting from *United States v. Gypsum Co.*, *supra*, that "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court is left with

a definite and firm conviction that a mistake has been committed,” went on to declare (p. 925):

“* * * This simple statement *does not convert the appellate tribunals into fact finding de novo trial courts*. The *presumption of correctness* of the trial court, the *view of the witnesses* and the *live feel of the open forum* are all ingredients of the compound which we may adjudge as valid or ‘clearly erroneous.’
* * *” (Emphasis added.)

And in *Paramount Pest Control Service v. Brewer, supra*, this Court, quoting from *Federal Savings & Loan Ins. Corp. v. First National Bank*, 164 F. 2d 929 (8th Cir. 1947), observed (p. 567):

“‘We are *not at liberty to substitute our judgment for that of the trial court* and on appeal *that view of the evidence must be taken which is most favorable to the prevailing party*, and if, when so viewed, the findings are supported by substantial competent evidence they should be sustained.’” (Emphasis added.)

B. Appellant’s Purported Employment of Margaret M. Swanson.

I. Appellant’s Liability Under the False Claims Act Is Conclusively Established by His Prior Conviction.

On June 15, 1955 appellant was convicted in the United States District Court for the District of Columbia for violation of Title 18, United States Code, Section 1001; and on January 19, 1956 this conviction was affirmed by the United States Court of Appeals for the District of Columbia Circuit. Certiorari was denied by the Supreme Court of the United States on April 9, 1956. At the time

of trial no Petition for Rehearing in the Supreme Court had been filed by appellant, and the time for filing such a petition had then expired [Pre-Trial Conference Order, Tr. 238; Ex. 41].

A judgment of conviction operates conclusively upon the same issues in a civil case where the parties are the same (*Local 167 v. United States*, 291 U. S. 293, 298-299 (1934); *Austin v. United States*, 125 F. 2d 816 (7th Cir. 1943); *United States v. Guzzone*, 168 Fed. Supp. 711 (E. D. N. Y. 1958); *United States v. Salvatore*, 140 Fed. Supp. 470 (E. D. Penn. 1956); *United States v. Schneider*, 139 Fed. Supp. 826 (S. D. N. Y. 1956); *United States v. Ben Grunstein & Sons Co.*, 127 Fed. Supp. 907 (D. C. N. J. 1955); *United States v. Accardo*, 113 Fed. Supp. 783 (D. C. N. J. 1953), affirmed 208 F. 2d 632, cert. den. 347 U. S. 952; *United States v. Bower*, 95 Fed. Supp. 19 (E. D. Tenn. 1951)).

In the case at bar the issues underlying appellant's presentation of a false claim with respect to Margaret M. Swanson are the same as those set forth in Counts One through Seven of the Indictment relating to appellant's conviction [see Ex. 41]. These issues therefore were conclusively settled and adjudicated by appellant's conviction, except as to the amount of damages sustained by the United States.

2. Appellant's Liability, Both Under the False Claims Act and for Restitution Was Established by Evidence Presented at Trial.

Appellant's liability with respect to his purported employment of Margaret M. Swanson was established at trial primarily through the testimony of the following witnesses: Irving W. Swanson, husband of Margaret M.

Swanson [R. 221-312]; Margaret M. Swanson [R. 312-342]; John S. Pixley, employee of the Old Dominion Bank [Ex. 47, pp. 106-136]; and Ruth Dickson, former employee of appellant [R. 345-351].⁶ Their testimony coupled with the exhibits received in evidence presents a picture of clear liability.

During August of 1949 Irving W. Swanson, who was then employed as Assistant Reading Clerk for the House of Representatives [R. 222] had a conversation with appellant in the latter's office [R. 224-227]. The two men discussed the fact that appellant was in a "close" district, which might go either Democratic or Republican, and that some people were making a charge of nepotism because Mrs. Bramblett was on his payroll [R. 224-227]. During the course of the conversation it was suggested that Mrs. Swanson be placed on appellant's payroll in lieu of Mrs. Bramblett. Mr. Swanson said that he would ask his wife about it [R. 226-227].

After talking to his wife Mr. Swanson had a second conversation with appellant on the floor of the House [R. 228-229], during which Mr. Swanson told appellant that

⁶The Pre-Trial Order provided that the testimony of these witnesses as contained in the transcript of proceedings in *United States v. Ernest K. Bramblett*, No. 971-53, might be read into evidence in the present action [Tr. 238-239]. Also included in this provision of the Pre-Trial Order was the testimony of Harry Newlin Megill, Administrative Assistant to the Clerk of the House of Representatives [Ex. 47, pp. 51-94] and William Richard Bonsell, Sergeant-at-Arms of the House of Representatives [Ex. 47, pp. 97-106]. The testimony of Mr. Swanson, Mrs. Swanson, and Mrs. Dickson was read into evidence at trial [R. 221-342; 345-351], while the testimony of the other three witnesses was received in evidence as Exhibit 47 [R. 343-344].

Mrs. Swanson would go on appellant's payroll in lieu of Mrs. Bramblett, and that they "would turn the full amount of Mrs. Bramblett's salary back to her" [R. 228].

Thereafter, appellant gave Mr. Swanson some "hiring papers"⁷ [Exs. 18, 22, and 48] in blank and a Power of Attorney [Ex. 29] for Mrs. Swanson to sign. Mr. Swanson took these documents home, his wife signed them and he brought them back and gave them to appellant [R. 233-234]. The Power of Attorney authorized the Old Dominion Bank, Arlington, Va., *inter alia*, to collect checks drawn on the Treasurer of the United States payable to Mrs. Swanson [see Ex. 29].

Mrs. Swanson was placed on appellant's payroll commencing September 1, 1949, replacing Mrs. Bramblett, and she remained on his payroll through December 31, 1950 [see Ex. 48]. As salary checks were issued in the name of Mrs. Swanson, they were sent directly to the Old Dominion Bank and deposited in the joint checking account of Irving W. or Margaret M. Swanson. On the date of the deposit or shortly thereafter, Mr. Swanson usually withdrew by countercheck the amount of the deposit or slightly in excess thereof, gave the amount of the salary check in cash to appellant, and kept the amount of the ex-

⁷The employment of clerks by Members of the House of Representatives generally is covered by the testimony of Harry Newlin Megill, Administrative Assistant to the Clerk of the House of Representatives [Ex. 47, pp. 51-94]. A summary of this testimony is contained in the record [Tr. 275-276]. See also Title 2, U. S. C., Chapter IV, Sections 60(a)-92(c).

cess, if any, for his personal use. References to the record concerning this procedure, and the deviations therefrom, can better be depicted through reference to the following chart⁸ which was compiled from exhibits received in evidence:

Date of Salary Checks	Amount of Salary Checks	Date of Deposits	Date of Withdrawals	Amount of Withdrawals	Given to Mr. Bramblett	Retained for Personal Use
9-30-49	\$494.58	10- 3-49(5)	10-11-49	\$ 494.58	\$ 494.58	None
10-31-49	494.58	11- 1-49(7)	None			
11-30-49	479.64	12- 1-49(9)	None			
12-20-49	479.64	12-22-49(11)	1- 3-50	1,500.00	1,453.86	\$46.14
1-31-50	479.64	2- 1-50(12)	2- 3-50	525.00	479.64	45.36
2-28-50	479.64	3- 1-50(15)	None			
3-31-50	479.64	4- 1-50(16)	4- 3-50	500.00	479.64	20.36
4-28-50	479.64	4-29-50(19)	5- 2-50	500.00	479.64	20.36
5-31-50	479.64	6- 1-50(20)	6- 8-50	500.00	479.64	20.36
6-30-50	479.64	7- 3-50(23)	7- 7-50	550.00	479.64	70.36
7-31-50	479.64	8- 2-50(25)	8- 2-50	525.00	479.64	45.36
8-31-50	479.64	9- 1-50(27)	None			
9-29-50	479.64	9-30-50(29)	None			
10-31-50	460.64	11- 2-50(31)	11- 9-50	1,440.00	1,440.00	None
11-30-50	460.64	12- 2-50(33)	12- 5-50	500.00	460.64	39.36
12-20-50	460.64	12-22-50(36)	1- 3-51	500.00	460.64	39.36

⁸In the above chart the dates and amounts of the salary checks may be verified by examination of Ex. 32, certified photostats of cancelled checks, Margaret M. Swanson, payee. The dates of deposits may be verified either from the deposit slips [Ex. 37] or from the ledger sheet [Ex. 39]. The deposit slips, appellee believes, affords a simpler means of verification. While each deposit slip was not separately marked at trial; each bears a separate number in script. The number on the deposit slip in question is shown in the above chart. The dates and amounts of withdrawals may also be determined from the ledger sheet [Ex. 39]; however, since withdrawal was in all instances except one [Ex. 38-I] by countercheck, the dates on the counterchecks [Exs. 38-A through H and Exs. 38-J through K], except in that one instance, are the same as the date on the ledger sheet. Comparison may be simplified by reference to the List of Exhibits contained in the record [Tr. 321-322].

With respect to salary check dated September 30, 1949⁹ shown on the above chart, Mr. Swanson withdrew the exact amount of the deposit by countercheck [Ex. 38-A] and turned the cash over to appellant [R. 241-246]. For salary checks dated October 31, 1949 and November 30, 1949, however, the customary procedure was not followed because Congress having adjourned, Mr. Swanson was out of town and could not make repayment [R. 247-248]. However, in January, when Mr. Swanson returned, he withdrew by countercheck the sum of \$1500 [Ex. 38-B], gave appellant the sum of \$1453.86 in cash, covering the salary checks for October, November, and December, 1949, and retained the balance for his personal use [R. 248-250].

Mr. Swanson followed the usual procedure with respect to salary check dated January 31, 1950 [R. 250-251]. However, for check dated February 28, 1950 there was a deviation [R. 251-252]. Mr. Swanson, after computing the increased amount of his income taxes occasioned by the salary being paid into his account deducted this amount from the February check and gave appellant the remainder in cash R. 252-254]. No countercheck was used [R. 254].

The customary procedure was followed for salary checks dated March 31, 1950 [R. 254-256; Ex. 38-D], April 28, 1950 [R. 256-257; Ex. 38-E], May 31, 1950 [R. 257-259; Ex. 38-F], June 30, 1950 [R. 259-260; Ex. 38-G], and July 31, 1950 [R. 262-263; Ex. 38-H].

During the latter part of August, 1950 appellant came to Mr. Swanson and asked the latter whether he could

⁹In the record the transactions are referred to by the month during which Mr. Swanson withdrew the amount of the deposit from the bank. This was always the month following the date of the salary check.

give him Mrs. Bramblett's salary for three months. Mr. Swanson told appellant that he didn't have that amount of money. Appellant then asked Mr. Swanson to write him out a check for the three months' salary and post-date it. Mr. Swanson thereupon wrote out a personal check for \$1440 [Ex. 38-I], which was the approximate amount of Mrs. Swanson's salary checks for August, September, and October, 1950,¹⁰ post-dated it November 1, 1950, and gave it to appellant¹¹ [R. 263-267]. The usual procedure was followed with regard to salary checks dated November 30, 1950 [R. 269-270; Ex. 38-J] and December 20, 1950 [R. 270-271; Ex. 38-K]. Mrs. Swanson's name came off appellant's payroll effective December 31, 1950 [see Ex. 48].

During the period from September 1, 1949 through December 31, 1950 Mrs. Swanson performed no work whatever for appellant [R. 290-291, 313]. Mrs. Swanson did not even meet appellant until the summer of 1950 [R. 312]. Ruth Dickson was an employee of appellant continuously from August 1, 1949 to August 31, 1950 [see Exs. 28-H and 28-I; see also an alphabetical list of appellant's employees contained in the record which was compiled from exhibits received in evidence—Tr. 314].

From January 1, 1950 through August 31, 1950 Mrs. Dickson worked full time in appellant's congressional

¹⁰Had the salary checks for the three months remained the same, the total would have come to \$1438.92 or $3 \times \$479.64$; however, for some reason the check dated October 31, 1950 was reduced to \$460.64 causing the total for the three months to actually come to only \$1419.92.

¹¹It was clearly established during trial that appellant realized the proceeds of the \$1440 check. Mrs. Gladys E. Dean was an employee of Grove Pharmacy, Pacific Grove, California [R. 357], and her endorsement appears on the reverse side of this check [see Ex. 38-I; R. 367]. She testified that she cashed it at appellant's request and turned the proceeds over to appellant [R. 367-368]. Appellant himself admitted this [R. 461].

office [R. 347]. Mrs. Dickson met Mrs. Swanson only once, during 1950 [R. 348]. Mrs. Dickson at no time saw Mrs. Swanson do any work in the office; did not know of any work that Mrs. Swanson performed for appellant at any time; did not see any reports or messages or correspondence coming from Mrs. Swanson into the office; and did not see or know of any reports, requests for information, instructions, telephone calls, or anything going from the office to Mrs. Swanson [R. 350-351].

C. Appellant's Purported Employment of Olga Hardaway.

Appellant's liability with regard to his purported employment of Olga Hardaway was established at trial chiefly through the testimony of Olga Hardaway¹² [R. 67-182] and John M. Hardaway [R. 183-214]. Mrs. Hardaway first met appellant in approximately September, 1950 at her home in Santa Barbara, California [R. 68]. Her husband, John M. Hardaway, had signed a contract with the Republican Central Committee to handle appellant's campaign for reelection as campaign manager [R. 69, 184]. During the 1950 campaign Mrs. Hardaway was employed with the John M. Hardaway Advertising Agency in a secretarial capacity [R. 69, 184].

During the 1950 campaign Mrs. Hardaway and her husband became very good friends of appellant, and on a number of occasions appellant stayed overnight at their home in Santa Barbara [R. 70, 185]. While there appellant made a number of telephone calls for which he promised to reimburse them [R. 70, 185].

¹²This witness testified under her present name, Olga Rogers [R. 67]; however, she will be referred to in this brief by her name at the time the pertinent events took place, Olga Hardaway [R. 68].

During the campaign appellant had told Mrs. Hardaway that if they ever went to Washington and Mr. Hardaway became his public relations man, he would like to have Mrs. Hardaway work in his office [R. 74]; and sometime before the election [R. 128] at her home in Santa Barbara [R. 73] appellant handed her "hiring papers" [Exs. 7, 19, and 23]¹³ in blank [R. 129] and asked her if she would put her signature to them and that he would file them until such time as she went to Washington [R. 74, 75, 78, 128].

Mrs. Hardaway was placed on the payroll of the Disbursing Office of the House of Representatives effective November 1, 1950 [Ex. 7]. During November, 1950 Mrs. Hardaway did no work for appellant, aside from her duties with the John M. Hardaway Advertising Agency, which was handling appellant's campaign for reelection [R. 81, 186]. Indeed, after election day Mrs. Hardaway became ill and stayed home for the remainder of the month [R. 81]. Nor did appellant do any work for appellant during December, 1950 and January, 1951 [R. 81, 186, 200].

During December, 1950 Mr. Hardaway, appellant, and one Elmarie Dyke formed a partnership for the purchase of a newspaper, the Pacific Grove Tribune [R. 81, 189-190]; and in connection with this venture Mr. and Mrs. Hardaway became indebted to appellant in the sum of approximately \$4,000, signing a note for this amount on December 15, 1950 [R. 82-83, 189-190, 200].

During January, 1951 the Hardaways moved to Pacific Grove, California, Mr. Hardaway preceding Mrs. Hard-

¹³Exhibits 7 and 19 purport to have been sworn to before Sadie Molineu, Notary Public. Sadie Molineu was a Notary Public in the District of Columbia [R. 389]. The first time that Mrs. Hardaway went to the District of Columbia was during 1953 [R. 80, 192].

away [R. 83, 187]. Around February 3, 1951 Mrs. Hardaway started working regularly for the Pacific Grove Tribune at a salary of \$200 a month [R. 83-84, 190-191]. Shortly after this employment commenced Mrs. Hardaway began to take a number of telephone calls for appellant and to perform other miscellaneous duties for him in addition to her work at the newspaper [R. 85-86]. These additional duties continued until the newspaper was sold in November or December, 1951 [R. 87].

During December, 1950 Mr. Hardaway had a conversation with appellant at the Hardaway home in Santa Barbara [R. 189] during which appellant said that he had "something for Olga to sign, and it was in regard to his air travel, and it had to be made out in somebody's name, and he made it out in hers" [R. 189]. During December, 1950 sometime before Christmas appellant presented to Mrs. Hardaway at her home in Santa Barbara her November salary check [Ex. 33-A] and asked her to sign it. Mrs. Hardaway signed this check and returned it to appellant¹⁴ [R. 88-92, 135-137]. At the time of signing Mrs. Hardaway had never worked for the United States Government and had never seen a Government check previously [R. 91-92].

Mrs. Hardaway's December salary check [Ex. 33-B] in the amount of \$95 was received by mail; and Mrs. Hardaway applied it to their business account, believing

¹⁴This check [Ex. 33-A] as well as checks dated October 31, 1951 [Ex. 33-G] and November 12, 1951 [Ex. 33-H] bear the endorsement of the Sergeant-at-Arms, House of Representatives [Ex. 47, p. 104]. The Sergeant-at-Arms testified that in his disbursing function he operated a sort of small bank for Members of the House [Ex. 47, p. 100] and that it was possible for a member to cash a check there without himself endorsing it [Ex. 47, p. 105].

it was to offset the charges on their telephone bill [R. 93-95, 138].

Appellant presented Mrs. Hardaway's January, February, and March checks [Exs. 33-C, 33-D, and 33-E] to her for signature in the prescription room of the Grove Pharmacy in Pacific Grove during the latter part of April or the first of May. The checks were presented face down on the counter. After Mrs. Hardaway signed the checks appellant picked them up and kept them¹⁵ [R. 95-97, 142-144]. Mrs. Hardaway's April check [Ex. 33-F] was signed in the same manner, appellant retaining it¹⁶ [R. 98, 148-151].

When appellant was out in California in May, 1951, he told Mrs. Hardaway that he realized that she had been doing some "extra-curricular" work for him and that he was placing her name on his payroll to compensate for her efforts [R. 99, 115]. Thereafter, Mrs. Hardaway received her salary checks dated October 31, 1951 and November 1951 by mail¹⁷ and she realized the proceeds of these checks [R. 98-102].

Appellant presented to Mrs. Hardaway for signature her salary check dated October 31, 1951 and November 12, 1951 [Exs. 33-G and 33-H] at the newspaper office.

¹⁵Exhibits 33-D and 33-E bear the second endorsement of Dyke's Grove Pharmacy, although this endorsement was apparently omitted inadvertently from Exhibit 33-C. Appellant was at one time a partner in this pharmacy [R. 396-397].

¹⁶Exhibit 33-F bears the second endorsement "Peninsula Furniture Exchange The Auction Studio W. R. La Porte Pearl M. La Porte." Appellant and the La Portes were very good friends [R. 398].

¹⁷The Permanent Mailing Order for Olga Hardaway dated May 29, 1951 [Ex. 27] shows that only the checks for May, June, July, August, and September were mailed [see also Ex. 47, p. 79]. The remaining checks were undoubtedly picked up by or on behalf of appellant.

Appellant retained these checks after Mrs. Hardaway had signed them, and the latter realized none of their proceeds [R. 102-103, 151-163]. Mrs. Hardaway's salary check dated November 30, 1951 was delivered to her by appellant and she realized its proceeds [R. 103-104].

On December 8, 1952 Mrs. Hardaway received a telephone call from appellant during which appellant said that his records were being investigated and that she would undoubtedly be contacted by the F.B.I. and that she "knew what to do" [R. 116].

On the morning of December 31, 1952 Mr. Hardaway received two telephone calls from appellant, both from Washington, D. C.; one around ten o'clock and the other around eleven [R. 193-194]. During the first conversation appellant asked Mr. Hardaway how things were in the district and the latter replied that nothing actually had happened but things were getting hot, that the F.B.I. was investigating [R. 197-198]. Appellant's answer to that was "well, we understand each other on this, and just don't worry about it, I'll fix it" [R. 198]. Mr. Hardaway urged appellant not to fix it but get an attorney and let him do the fixing [R. 198]. Appellant thereafter said "I think this wire is tapped, I will call you back later" [R. 198].

During the second telephone conversation appellant said that he had talked to his attorney, and that everything was all understood, that the checks were payments on the note. Mr. Hardaway pointed out that some of the checks, or at least one of them couldn't have been payment on the note because the note didn't exist then. Appellant said "that's all right, it is just your word against theirs" [R. 199-200].

D. Appellant's Purported Employment of Lillian South.

The liability of appellant with respect to his purported employment of Lillian South was established primarily through the testimony of Mrs. South [R. 13-66]. Mrs. South first met appellant late in the year 1945 [R. 14-15]. John F. South, the husband of Mrs. South who is now deceased, was appellant's campaign manager for the 1946 election and Mr. and Mrs. South worked as a team in the campaign [R. 15-16]. After the election Mr. and Mrs. South went to Washington with appellant, arriving there on January 1, 1947 [R. 16]. Upon arrival Mr. South was employed by appellant as his Executive Secretary [R. 16-17].

Shortly after reaching Washington Mrs. South had a conversation with appellant during which the latter told Mrs. South that there was a fund for Clerk hire and it had not been used up, that her name was placed on the payroll and she was to do a certain amount of work, but a portion of her salary was to come to her and the rest of it was to be returned to the office, to appellant; that she was to retain \$15.01 of her check and \$95 was to be returned to appellant [R. 17-18].

Thereafter Mrs. South signed "hiring papers" [Exs. 12, 17, and 21] and received monthly pay checks as an employee of appellant [R. 17-21]. When she received her salary check for January, 1947 in the amount of \$103.02, she cashed it, retained approximately \$8 of the proceeds, and placed the remainder in an envelope and gave it to Mr. South¹⁸ [R. 22-23]. Similarly, when Mrs. South

¹⁸The witness testified "I placed it in an envelope and gave it to Mr. South, to give to Mr. Bramblett" [R. 23-24]. The District Court struck the phrase "to give to Mr. Bramblett" [R. 23-24]; however the witness' purpose in giving the envelope to Mr. South is clear from the prior conversation she had with appellant [R. 17-18].

received her salary checks for each of the months of February, 1947 [Ex. 30], March, 1947 [Ex. 36-A], April, 1947 [Ex. 36-B], May, 1947 [Ex. 36-C], and June, 1947 [Ex. 36-D] each in the amount of \$110.01, she cashed the checks, retained \$15.01 of the proceeds of each check, and placed the remainder in an envelope and took it to appellant's office [R. 26-27, 27-28, 29-30, 30-31, 31]. In at least one instance Mrs. South gave the envelope to appellant himself [R. 49]. On other occasions it was sent by Mr. South [R. 48, 49] or placed in appellant's desk drawer [R. 50]. Mrs. South realized all of the proceeds of her salary checks for the months of July, 1947 [R. 31-32], August, 1947 [R. 32], September, 1947 [R. 33], October, 1947 [R. 33], November, 1947 [R. 33], and December, 1947 [R. 33].

Mrs. South remained in the District of Columbia from January 1, 1947 to late July, 1947 [R. 37]. During this period she did no work as a clerk in the office of appellant although she assisted her own husband in the evenings editing stories and speeches [R. 46] and performed other occasional duties for appellant [R. 47]. From late July through December, 1947 Mrs. South did perform work for appellant as his clerk, either in his Pacific Grove office [R. 39] or in his District of Columbia office [R. 39-40].

E. Other Evidence of a General Scheme by Appellant to Divert the Clerk-Hire Allowance to His Own Use.

In addition to the witnesses heretofore mentioned, the testimony of Vivian DeWitt¹⁹ [R. 410-459] also shows a general scheme of appellant to divert the Clerk-Hire Al-

¹⁹This witness testified under her married name, Vivian DeWitt Cohan [R. 410]. In connection with her employment, however, she used her maiden name, Miss Vivian DeWitt [R. 411]. The latter name will be used in this brief.

lowance to his own use. This testimony is clearly relevant (*Castle v. Bullard*, 64 U. S. 172, 187 (1859); *Worthington v. United States*, 64 F. 2d 936, 940-941 (7th Cir. 1933); *Sacramento Suburban Fruit Lands Co. v. Elm*, 29 F. 2d 233 (9th Cir. 1928); *Knudsen v. Domestic Utilities Mfg. Co.*, 264 Fed. 470 (9th Cir. 1920)).

At the time of trial Miss DeWitt had been employed on "Capitol Hill" more than fifteen years [R. 411]; and she was employed as a full time clerk in the congressional office of appellant from January 3, 1947 through October 31, 1949 [R. 412-414]. When appellant interviewed Miss DeWitt prior to her employment he told her that at the time he could allow her \$2,400 a year basic salary; however, by the end of the first six months she would have a substantial increase. At the end of six months, however, Miss DeWitt did not get the promised salary increase [R. 421-422].

Between the middle of July, 1947 and the first of January, 1949 Miss DeWitt had several conversations with appellant, during which she told appellant that she felt that the increase was due her in view of the duties she performed and the promise given her originally and that she would like to have an increase in salary [R. 422-423]. Appellant told her that he could not do it at that time [R. 423-424].

During March of 1949 Miss DeWitt had a conversation with appellant during which she told him that she would like to have an increase in salary which would help in the eventuality of retirement benefits, and also that it was embarrassing to hold the type of position that she was holding when the other people and friends were being compensated in accordance with their like duties, and for the Clerk-Hire of the House of Representatives to be open

for public inspection and public knowledge that she was still working for less than typist's salary. Appellant said that he would think it over [R. 424-425].

A few days later appellant called Miss DeWitt into his office. When she entered appellant asked her to close the inter-office door and be seated [R. 425]. The following conversation then took place [R. 426]:

“A. He asked me if I had any cash or could I get ahold of any cash, and I asked why, and he said, well, could I get the amount of something over \$5,000 and give it to him. I—\$5,000. I said ‘Well, I think I can. Why?’ And he said ‘if you will give me this amount then I will put you on the clerk hire payroll at \$5,000 basic salary.’ I told Mr. Bramblett that I felt that that wasn’t right, that it was against the law, and termed a ‘kick back.’ He firmly told me that it was not that way at all, nothing like it. I said ‘Well, this in turn would be a kick ahead’ and I still didn’t think it was legal. And he told me to think it over for a day or two, and let him know.”

Two or three days later appellant mentioned to Miss DeWitt that she had not reported to him about the matter they were talking about in his office and asked for her decision. She told appellant she would not do it [R. 426-427].²⁰

²⁰The only salary increase received by Miss DeWitt during her employment was for \$100 effective August 1, 1949 [see Ex. 28-I; see also the conversation between appellant and Miss DeWitt concerning this \$100 increase, R. 428]. A chart showing the comparative salaries of appellant's employees as of each date of hire or pay change is contained in the record [Tr. 316-317].

F. The Clerk-Hire Allowance Belongs to the People of the United States.

While Congress allowed its members complete freedom in fixing the salaries of its employees and removing them at will (Title 2, U. S. Code, Secs. 60g and 92), and while there was not in existence a statute known to appellee specifying the duties which must be performed by an employee of a Member of the House of Representatives; this did not operate as a license for appellant to represent to the Disbursing Officer of the House of Representatives that certain persons were employed as clerks when in fact they were not; nor did it authorize appellant to divert the Clerk-Hire Allowance to his own use (See *Belvin v. United States*, 260 Fed. 455 (4th Cir. 1919)).

The Clerk-Hire Allowance belongs to the people of the United States and not to the Member of Congress;²¹ and the people are entitled to a *quid pro quo* for its expenditure.²² Appellant, as a Member of the House of

²¹Page 6 of Defendants' Exhibit "J," a pamphlet entitled Salary and Allowances, Members of Congress, House of Representatives, 83rd Congress, prepared by Lyle O. Snader, Clerk of the House of Representatives reads in part:

"... Appointments of clerks are limited to seven, and such appointments cannot be made retroactive to a date prior to a current month. The allowance is paid in monthly installments. *It is not cumulative and any portion of a monthly allowance not used reverts automatically to the United States Treasury.*" (Emphasis added.)

This exhibit, while published after the period here involved, was offered on the basis that its essential provisions had not changed [R. 512-513].

²²The purported employees of appellant were not officers of the United States [compare: *United States v. Grant*, 237 F. 2d 511 (7th Cir. 1956)]. The distinction between officers and employees of the United States has long been recognized [*Burnap v. United States*, 252 U. S. 512, 516 (1920); *United States v. Smith*, 124 U. S. 525 (1888); *United States v. Mouat* 24 U. S. 303 (1888)].

Representatives, occupied a public office (*Pope v. Commissioner of Internal Revenue*, 138 F. 2d 1006, 1009 (6th Cir. 1943); 67 C. J. S. Officers, Secs. 1-3); and a public office is a position of trust (*Tool Company v. Norris*, 2 Wall. (69 U. S.) 45, 59 (1864); *State v. Eaton*, 133 P. 2d 588, 591, 114 Mont. 199 (1943); 67 C. J. S. Officers, Secs. 1, 6). As set forth in 67 C. J. S. Officers, Sec. 6, at pages 117-118:

“Public offices are not held by contract or grant, and are not deemed created for the benefit of the individuals who for the time being occupy them, *or for the profit, honor, or private interest of any one man, family, or class of men. They are considered, rather, as public trusts or agencies to be held and administered entirely for the benefit and in the interest of the people.*” (Emphasis added.)

II.

THE GOVERNMENT WAS NOT BARRED BY STATUTES OF LIMITATIONS FROM OBTAINING THE RELIEF GRANTED BY THE DISTRICT COURT.

A. Relief Under the False Claims Act.

No relief was granted by the court below *under the False Claims Act* with respect to appellant's purported employment of Lillian South, since appellee conceded that such relief was barred [R. 9]. Conversely, there can be no serious contention that recovery under the False Claims Act was barred as to appellant's purported employment of Olga Hardaway; since the initial Clerk-Hire Allowance form relating to Mrs. Hardaway is dated November 1, 1950 [See Ex. 7], while the original complaint herein [Tr. 2-4] was filed on October 31, 1956, clearly within the 6-year period.

The only debatable issue as to limitations under the False Claims Act, therefore, relates to appellant's purported employment of Margaret M. Swanson. Although the Clerk-Hire Allowance form for Mrs. Swanson is dated August 27, 1949 and she was placed on the payroll of the Disbursing Office of the House of Representatives effective September 1, 1949 [See Ex. 48]; the court below found that the false claim which appellant presented and caused to be presented with respect to his purported employment of her "was a continuing one, commencing when the Clerk-Hire Allowance form for Margaret M. Swanson was submitted and continuing until her name was removed from the payroll." [Findings of Fact VII, Tr. 367]. The District Court concluded that appellee was not barred by the limitations contained in Title 31, U. S. Code, Section 235, from recovering forfeitures and double the amount of damages which the United States sustained on and after November 1, 1950 by reason of appellant's purported employment of Margaret M. Swanson [Con. of Law V and VII, Tr. 371, 372]; but that appellee was barred from recovering double damages "sustained before November 1, 1950, the original complaint herein having been filed on October 31, 1956" [Con. of Law VI, Tr. 372].

The conclusions reached by the court below are in accord with the decision of the Court of Appeals for the District of Columbia Circuit in *Bramblett v. United States*, 231 F. 2d 489 (Dist. Col. Cir. 1956), cert. den. 350 U. S. 1015, involving an appeal from the conviction of appellant herein for violation of Title 18, U. S.

Code, Section 1001. The court there concluded with respect to Mrs. Swanson's employment that (p. 491):

“* * * A continuing crime of falsification by a scheme is thus charged and proved, and *the period of limitations did not begin to run until the scheme ended * * **” (Emphasis added.)

While the language of Title 18, U. S. Code, Section 1001 is different from that of Title 31, U. S. Code, Section 231, the limitations question should be treated in the same manner. Once a member of the House of Representatives files a Clerk-Hire Allowance form designating a person as his clerk and authorizing him to receive compensation, such person continues on the payroll until there is a revocation in some manner by the Member [Ex. 47, pp. 64-65]. The form therefore constitutes a continuing claim for monthly salary payments.²³

B. Restitution of Monies Wrongfully Received.

As to Margaret M. Swanson a large portion of the relief granted appellee consisted of monies wrongfully received by appellant, monies which belonged to the United States; and as to Lillian South all of the granted relief was of this nature.²⁴ The United States is not barred

²³The following hypothetical example favors the construction contended for by appellee: A contrives a fraudulent scheme whereby on September 1, 1949 he submits to the Disbursing Officer of the House of Representatives a Clerk-Hire Allowance form effective September 1, 1949; and in furtherance of this scheme the designated employee commences work on September 1, 1949 and continues to work until September 1, 1955, thereafter ceasing to work but continuing to receive salary payments until September 1, 1959.

²⁴The manner in which damages were computed as to each of the three alleged employees is contained in the record: Olga Hardaway [Tr. 287-288]; Margaret M. Swanson [Tr. 295-297]; Lillian South [Tr. 299-300].

from recovering such monies at any time (*United States v. Summerlin*, 310 U. S. 414 (1940); *United States v. Wurts*, 303 U. S. 414, 416 (1938); *Shutt v. United States*, 218 F. 2d 10, 12 (5th Cir. 1954); *United States v. Borin*, 209 F. 2d 145, 148-149 (5th Cir. 1954), cert. den. 348 U. S. 821; *United States v. Silliman*, 167 F. 2d 607, 611 (3d Cir. 1948), cert. den. 335 U. S. 825; *United States v. First Nat. Bank of Prague*, 124 F. 2d 484 (10th Cir. 1941); *United States v. Scott*, 139 Fed. Supp. 921, 922 (S. D. N. Y. 1955); *United States v. Hicks*, 137 Fed. Supp. 564, 566 (N. D. Tex. 1956); *United States v. Utica Meat Co.*, 135 Fed. Supp. 834 (N. D. N. Y. 1955)).

CONCLUSION.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney,

RICHARD A. LAVINE,

Assistant U. S. Attorney,

Chief of Civil Division,

JAMES R. DOOLEY,

Assistant U. S. Attorney,

Attorneys for Appellees.

No. 16455 ✓

United States
Court of Appeals
for the Ninth Circuit

LUCY K. COHEN,

Appellant,

VS.

WESTERN HOTELS, INC., and E. B. DeGOLIA,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

AUG 13 1959

PAUL P. O'BRIEN, CLERK

No. 16455

United States
Court of Appeals
for the Ninth Circuit

LUCY K. COHEN,

Appellant,

vs.

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Appeal from the United States District Court for the
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Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Appellant.

SEDGWICK, DETERT, MORAN & ARNOLD,
SCOTT CONLEY,

100 Bush Street,
San Francisco, California,

Attorneys for Appellee.



United States District Court, Northern District
of California, Southern Division

Civil Action No. 36938

LUCY K. COHEN,

Plaintiff,

vs.

WESTERN HOTELS, INC., a corporation, and
E. B. DeGOLIA, Defendants.

COMPLAINT (FOR DAMAGES FOR PER-
SONAL INJURIES) AND REQUEST FOR
JURY TRIAL

Plaintiff complains of defendants and each of
them and for cause of action alleges:

I.

(a) The jurisdiction of this Court is founded on
diversity of citizenship and amount. 28 USC §1332.

(b) Plaintiff is also known as Lucy M. Kramer,
Lucy Kramer Cohen, and Mrs. Felix S. Cohen. At
all times hereinafter mentioned, she was and now is
a citizen of the District of Columbia.

(c) At all times hereinafter mentioned, defendant
Western Hotels, Inc., was and now is a corporation
organized under the laws of the State of Califor-
nia, and doing business in this District.

(d) At all times hereinafter mentioned, defend-
ant DeGolia was and now is a citizen of the State
of California.

II.

(a) At all times hereinafter mentioned, defendant DeGolia was the owner of premises located at 761 Post Street in the City and County of San Francisco, State of California, which premises were and now are operated as a hotel under the name "Hotel Maurice".

III.

At all times hereinafter mentioned, defendant Western Hotels, Inc. was and now is managing and operating said premises at 761 Post Street in the City and County of San Francisco, State of California, as agent of the defendant DeGolia; defendant Western Hotels, Inc. at all such times was and now is maintaining therein a hotel under the name "Hotel Maurice", and at all such times had and now has actual control of said premises.

IV.

On or about August 14, 1957 defendant DeGolia as owner, and defendant Western Hotels, Inc. as agent and as operator, were each separately charged with and responsible for the good, proper and safe maintenance of the premises at 761 Post Street, San Francisco, in a reasonably safe condition.

V.

On August 14, 1957 said Hotel Maurice was not maintained in a reasonably safe condition, inasmuch as there then was spread in its lobby a rug which

was not reasonably safe, and which was negligently and improperly maintained, in that:

(a) Said rug was not fastened securely to the floor.

(b) Said rug was allowed to form loops, wrinkles, ridges and other uneven places, and to bunch up at its edges, and did not lie flat against the surface of the floor.

(c) Said rug was so secured under two heavy potted plants as to bunch up between them and form loops, wrinkles, ridges and other uneven places and to bunch up at its edges, and not to lie flat against the surface of the floor.

(d) Said rug was situated on a mat which was smaller than the rug, and consequently there were formed loops, wrinkles, ridges and other uneven places at the points where the edge of the rug extended over the edge of the mat.

(e) Said rug was worn and dilapidated to a point where its fabric had broken down and formed uneven places, wrinkles, ridges and depressions, and where holes and bare and worn spots had appeared in its weave.

All of these conditions were the result of the failure of each of the defendants to use a proper and necessary degree of care to keep said lobby reasonably safe for guests of the hotel.

VI.

The dangerous and unsafe condition of said lobby and rug, described in paragraph V hereof, had existed long prior to August 14, 1957, and defendants

and each of them had or in the use of reasonable care should have had, full knowledge thereof prior to that date. Nevertheless defendants and each of them negligently, with want of due care and with reckless and wanton disregard for the safety of the guests of said Maurice Hotel, caused and permitted said rug to remain in the lobby of the hotel in its unsafe and dangerous condition as aforesaid.

VII.

Plaintiff, Lucy K. Cohen, had rented a room in said Maurice Hotel from defendants and each of them for the night of August 13, 1957 and had occupied said room during the night of August 13.

VIII.

On August 14, 1957 at or about the hour of 7:20 a.m., plaintiff checked out of said Hotel Maurice and attempted to leave the premises to return to her home in Washington, D. C. She then and there tripped and fell over and became trapped and ensnared in a loop, wrinkle, ridge, and uneven and bunched up place in said rug, and thereby was thrown and fell against the floor and sidewalls of the lobby of said hotel, as a consequence of which she suffered serious injuries and other loss and damages as hereafter set forth.

IX.

Plaintiff's fall and injuries were the direct consequences of the acts and omissions of each of the defendants in negligently permitting and suffering

said lobby and rug then and there to exist in such improper, dangerous and unsafe condition, as alleged in paragraphs V and VI of this complaint.

X.

As a direct and proximate result of defendants' careless and negligent conduct, plaintiff sustained severe bodily injuries, consisting of a multiple and shattering fracture of the right kneecap and several severe tears of tendons and ligaments in the vicinity of the right knee, extensive bleeding, cysts, multiple contusions and abrasions, trauma and faintness. Plaintiff is informed and believes and therefore alleges that the injuries complained of are permanent in nature and that by reason of said injuries she will be crippled and physically incapacitated for the remainder of her life.

By reason of the premises, plaintiff suffered physical disability and excruciating pain and anguish and will in the future so suffer, to her general damage in the sum of \$75,000.00.

XI.

At the time of said accident plaintiff was approximately 44 years of age and was gainfully employed by the United States Government at Washington, D. C., and also earned income as a writer and compiler of articles for publication. As a result of the injuries caused by defendants' said negligent and careless conduct plaintiff was unable to pursue her employment from August 14 to October 14, 1957, suffering a loss of income from the United

States Government in the amount of \$1,540.00, and from writing and editing in the amount of \$350.00, and plaintiff's health further was and will be so impaired that she may hereafter be disabled and prevented from pursuing her occupation and employment. Consequently plaintiff has suffered loss in the amount of \$1,890.00 and will suffer such loss and diminution of earnings hereafter in an amount which is not known. When this loss is determined plaintiff will amend this complaint to allege the full extent thereof.

XII.

As a direct and proximate result of the negligent and careless conduct of defendants and each of them, plaintiff was caused to and did become hospitalized and became liable for hospital, doctors', surgeons', nurses', drug and other bills; and plaintiff was caused to and did incur bills and charges for additional transportation, special garments, telephone calls and divers and sundry other things and services resulting directly from her confinement at a place away from her home to which she was in the process of returning on the morning of the accident; and plaintiff did require and become liable for special expenses for medical and physical therapy, special household help, taxi fares, supervision and travel and similar costs with regard to her minor daughters, and divers other services and things which she would not have required except for her incapacity resulting from said accident. The reasonable cost of all of these bills and expenses,

now incurred and which may reasonably be expected to be incurred hereafter is estimated at \$15,000.00.

XIII.

Plaintiff is informed and believes and therefore alleges that her injuries will hereafter require additional surgery, and will cause plaintiff hereafter to become further hospitalized and to become further liable for hospital, doctors', surgeons', nurses', drug and other bills and expenses in an amount which is not presently known. When the reasonable cost of such bills and expenses is determined plaintiff will amend this complaint to allege the full extent thereof.

Wherefore, plaintiff prays judgment against defendants and each of them:

1. For the sum of \$75,000.00 as and for general damages.

2. For special damages for loss of earnings in the amount of \$1,890.00 and such amount as will compensate her for any additional loss of earnings.

3. For special damages for estimated expenses of plaintiff as the result of defendants' negligence in the amount of \$15,000.00, and in such additional amounts as plaintiff will incur for and in connection with further surgical, hospital and like treatment.

4. For costs of suit herein.

5. For such other and further relief as to the Court may seem proper.

Dated: December 9, 1957.

FREED & FREED,
/s/ By KURT W. MELCHIOR,
Attorneys for Plaintiff.

Plaintiff Requests That All Issues of Fact Herein
Be Tried by a Jury.

FREED & FREED,
/s/ By KURT W. MELCHIOR,
Attorneys for Plaintiff.

[Endorsed]: Filed December 26, 1957.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Come now the defendants Western Hotels, Inc., a corporation and E. B. DeGolia, and answering the complaint on file herein, admit, deny and allege as follows:

I.

Answering Paragraph I (b), these answering defendants allege that they have no information or belief sufficient to enable them to answer any or all of the allegations contained in that portion of Paragraph I of said complaint, and basing their denial upon the lack of such information or belief, deny said portion of said Paragraph I, both generally and specifically, and all the allegations therein contained.

Answering Paragraph I (c), these answering defendants admit that at all times therein mentioned defendant Western Hotels, Inc. was a corporation doing business in the State of California. Save and except as herein admitted, these answering defendants deny said Paragraph I (c) both generally and specifically and all the allegations therein contained.

II.

Answering Paragraphs IV, V, VI, VIII, IX, X, XI, and XII, these answering defendants deny the same, both generally and specifically, and all the allegations therein contained; deny that plaintiff was, or will be damaged in the sums of \$75,000.00, \$1540.00, \$350.00 and \$15,000.00, or in any other sum or sums or at all.

III.

Answering Paragraph XIII, these answering defendants allege that they have no information or belief sufficient to enable them to answer any or all of the allegations contained in Paragraph XIII of said complaint, and basing their denial upon the lack of such information or belief, deny said Paragraph XIII, both generally and specifically, and all the allegations therein contained.

As and for a Further, Separate and Distinct Affirmative Defense to the Complaint, these answering defendants allege that plaintiff was negligent in and about the matters referred to in said complaint and that such negligence on the part of said

plaintiff proximately and concurrently contributed to the happening of the accident and to the injuries, loss and damage complained of by plaintiff, if any there were.

Wherefore, these answering defendants pray that plaintiff take nothing by reason of the complaint; that defendants be awarded their costs of suit herein and such other and further relief as the Court deems just.

KEITH, CREEDE & SEDGWICK,
Attorneys for said Defendants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed January 29, 1958.

[Title of District Court and Cause.]

PLAINTIFF'S JUROR'S QUESTIONS

1. Do any of you or members of your families work for or own stock in any hotel? Details.

2. Have any of you or members of your family ever sued or been sued over an accident or personal injury?

3. Have any of you or members of your family ever been involved in an accident resulting in a personal injury requiring hospitalization? Details.

4. Do any of you have any prejudice against women in professional or Government jobs?

5. Do or did any of you, or any members of

your family, work for or have any interest in the Royal Indemnity Company?

6. Have any of you served as members of a trial jury in this court within the past year?

Presented by Mr. Melchior.

[Endorsed]: Filed December 29, 1958.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER TO CONFORM
TO PROOF

Come now the defendants above named and after leave of Court first obtained, do hereby amend the Answer to the Complaint heretofore filed, as follows:

I.

Answering Paragraph III of Plaintiff's said Complaint, these answering defendants deny the same, both generally and specifically, and all the allegations therein contained.

Wherefore, these answering defendants pray that plaintiff take nothing by her complaint; that defendants be awarded their costs of suit herein and such other and further relief as the Court deems just.

/s/ WALLACE E. SEDGWICK,
KEITH, CREEDE & SEDGWICK,
Attorneys for Defendants.

[Endorsed]: Filed January 7, 1959.

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTS TO CHARGE
NUMBERS 1 THROUGH 30

* * * * *

Plaintiff's Proposed Instruction No. 18

Contributory Negligence—Unanticipated Danger

Contributory negligence is not imputable to a plaintiff for failing to look out for a danger which she had no reasonable cause to apprehend.

Laird v. T. W. Mather, Inc., 51 A. C. 208 at 216.

Plaintiff's Proposed Instruction No. 19

Failure to Observe Obvious Danger

It is possible that you may find that the rug was in a dangerous condition, but that Mrs. Cohen might have seen the dangerous condition of the rug and thus have avoided the accident by stepping around it. But it does not follow from the fact that she might have seen this condition had she looked, that she was contributively negligent as a matter of law. All of the circumstances must be taken into account by you, and if you find that there was some reasonable excuse for a failure by Mrs. Cohen to observe danger from the rug, her conduct may be excused even though the danger was obvious. It was not necessarily negligent to fail to look for dangers in a hotel or business establishment when the ordinarily prudent person would not in fact expect to find the condition where it is, or where

she is likely to have her attention distracted as she approached it.

Laird v. T. W. Mather, Inc., 51 A. C. 208 at 215.

Plaintiff's Proposed Instruction No. 20

Contributory Negligence: Assumption That Way
Is Clear

Conceding for the sake of argument that, if Mrs. Cohen had looked down in front of her feet she might have noticed any dangerous condition of the rug, nevertheless you may find that in the circumstances she was reasonably justified in assuming that her way was unobstructed, and that her failure to see it was not necessarily negligence.

Laird v. T. W. Mather, Inc., 51 A. C. 208 at 216.

* * * * *

[Endorsed]: Filed January 7, 1959.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Defendant.

/s/ DAVID A. NICOLAIDES,
Foreman.

Filed January 7, 1957, at 2 o'clock and 30 minutes p.m.

C. W. CALBREATH,
Clerk,
/s/ By HOWARD F. MAGEE,
Deputy Clerk.

[Endorsed]: Filed January 7, 1959.

In the Southern Division of the United States District Court, Northern District of California

No. 36938-Civil

LUCY K. COHEN,

Plaintiff,

vs.

E. B. DeGOLIA,

Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on the 29th day of December, 1958, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Kurt W. Melchior, Esq., and Eli Freed, Esq., appearing as attorneys for plaintiff, and Wallace Sedgwich, Esq., and Scott Conley, Esq., appearing as attorneys for defendants, and the trial having been proceeded with on December 29 and 30, 1958, and January 6 and 7, 1959, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Defendant. David A. Nicolaides, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by rea-

son of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action, and that defendant go hereof without day, and that said defendant do have and recover of and from plaintiff his costs herein expended taxed at \$.

Dated: January 8, 1959.

/s/ C. W. CALBREATH,
Clerk.

Entered in Civil Docket January 8, 1959.

[Endorsed]: Filed January 8, 1959.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Plaintiff moves the court to grant a new trial in the above captioned case, on the following grounds:

I.

The court committed prejudicial error of law at the trial.

II.

The court committed prejudicial error of law at the trial in the admission and exclusion of evidence.

III.

The court committed prejudicial error of law at the trial in excluding plaintiff's proffered expert testimony.

IV.

The court committed prejudicial error of law at the trial in permitting issues to be considered which were not reflected in the pleadings.

V.

The court committed prejudicial error of law at the trial in ordering defendant Western Hotels, Inc. dismissed from the case.

Wherefore, plaintiff prays that a new trial be granted herein.

Dated: January 14, 1959.

FREED & FREED,
/s/ By KURT W. MELCHIOR,
Attorneys for Plaintiff.

To Keith, Creede & Sedgwick, Attorneys for Defendant:

Please take notice that the plaintiff will bring the above motion on for a hearing before Honorable Willis W. Ritter, United States District Judge, at his courtroom, Room 276, United States Court House, 7th and Mission Streets, San Francisco, California, at 10:00 a.m. on Tuesday, January 27, 1959, or as soon thereafter as counsel can be heard.

FREED & FREED,
/s/ By KURT W. MELCHIOR,
Attorneys for Plaintiff.

Certificate of Mailing Attached.

[Endorsed]: Filed January 15, 1959.

United States District Court for the Northern
District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 27th day of January, in the year of our Lord one thousand nine hundred and fifty-nine.

Present: the Honorable Willis W. Ritter.

[Title of Cause.]

This case came on regularly this date for hearing on motion for new trial. Ordered after hearing, motion for new trial denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Lucy K. Cohen, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 8, 1959, and from the order of dismissal as to defendant Western Hotels, Inc. entered herein on January 6, 1959.

Dated: February 25, 1959.

FREED & FREED,
/s/ By KURT W. MELCHIOR,
Attorneys for Plaintiff.

[Endorsed]: Filed February 26, 1959.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Appellant in the above-entitled matter intends to rely on the following points in the presentation of her appeal herein:

1. That the District Court erred in entering judgment for the defendants.

2. That the District Court erred in permitting defendants to amend their answer during the trial.

3. That the District Court erred in dismissing defendant Western Hotels, Inc., a corporation, from the case.

4. That the District Court erred in ruling on the admission and exclusion of evidence.

5. That the District Court erred in unduly restricting plaintiff's proofs.

6. That the District Court erred in excluding expert testimony offered by plaintiff.

7. That the District Court erred in excluding testimony offered by plaintiff as to the condition of a rug at the time of trial.

8. That the District Court erred in admitting testimony offered by defendants as to the condition of the same rug at the time of trial.

9. That the District Court erred in admitting testimony offered by defendants as to the absence of other accidents at the site of this accident.

10. That the District Court erred in excluding demonstrations offered by plaintiff.

11. That the District Court erroneously charged the jury about the law applicable to this case.

12. That the District Court erroneously charged the jury that negligence by defendants would have to be at the time of the accident to be actionable.

13. That the District Court erroneously refused to charge the jury on certain matters requested by plaintiff.

14. That the District Court erred in unduly curtailing examination of the jury panel on voir dire.

Dated: March 17, 1959.

FREED & FREED,
/s/ By KURT W. MELCHIOR,
Attorneys for Appellant.

Certificate of Mailing Attached.

[Endorsed]: Filed March 20, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by counsel for the appellant:

Excerpt from docket entries.

Complaint.

Answer to Complaint.

Amendment to Answer.

Plaintiff's Requests to Charges Nos. 1 through 30.

Requests for Questions to Be Asked of Jury Panel.

Verdict.

Judgment.

Motion for New Trial.

Minute Order Denying Motion for New Trial.

Notice of Appeal.

Appeal Bond.

Appellant's Designation of Record on Appeal.

Stipulation to Amend Designation.

Statement of Points Upon Which Appellant Intends to Rely on Appeal.

Order Extending Time to Docket Record on Appeal.

Reporter's Transcript of Record on Appeal.

Plaintiff's Exhibits: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 10-A, 11, 12, 13, 14, 15, 16, 17 and 18.

Defendant's Exhibits A, B, C, D, and E.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 1st day of May, 1959.

[Seal]

C. W. CALBREATH,

Clerk,

/s/ By MARGARET P. BLAIR,

Deputy Clerk.

In the District Court of the United States, Northern
District of California, Southern Division

No. 36,938

LUCY K. COHEN,

Plaintiff,

vs.

WESTERN HOTELS, INC., and E. B. DeGOLIA,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: Hon. Willis M. Ritter, Judge.

Appearances: For the Plaintiff: Messrs. Freed
& Freed, by Kurt W. Melchior and Eli Freed. For
the Defendant: Messrs. Keith, Creede & Sedgwick,
by Wallace Sedgwick, Scott Conley. [1]*

December 29, 1958, et seq.

The Court: All right. You may fill the jury box.

(Whereupon the following prospective jurors
were seated in the jury box in the order named,
and sworn:)

* * * * *

The Court: You have been called into the jury
box this morning, Ladies and Gentlemen, to try the
case of Lucy K. Cohen, plaintiff, against the West-
ern Hotels, Inc., and E. B. DeGolia.

The plaintiff here claims that the defendants were
negligent in that they maintained a rug on the floor

* Page numbers appearing at top of page of Reporter's Tran-
script of Record.

of the lobby of the Hotel Maurice in such fashion that she was caused [3] to fall and injure herself, and she seeks damages.

I mention that much about the case for the purpose of asking you folks if you have heard about this matter before you came here this morning. Have any of you heard about this case?

(No audible response.)

Do any of you know any of the people at counsel table? Plaintiff and her counsel sit at the nearest counsel table and defendant at the far counsel table. Have any of you any connection with the Western Hotels, Inc., or the Hotel Maurice? Yes, sir?

Mr. Harris: I travel on the road and I have stayed at the Maurice many times.

The Court: You have stayed at that hotel many times?

Mr. Harris: Yes.

The Court: Step down, please.

(Mr. Harris excused. Hartwell C. Kennedy called to the jury box, sworn.)

The Court: Do you know any of the folks at counsel table?

Mr. Kennedy: No, sir.

The Court: Have you had any connection with the Hotel Maurice or Western Hotels, Inc.?

Mr. Kennedy: No. [4]

The Court: Now, let's get your occupations, please, starting with Juror No. 1.

Mr. Kennedy: Laboratory assistant.

Mr. Sedgwick: I am sorry, I can't hear.

Mr. Kennedy: Senior laboratory assistant.

The Court: Next?

Mr. Lowe: Pacific Gas and Electric Company janitor.

The Court: Next?

Mr. Perlee: Safety engineer specializing in boilers.

Mr. Davis: I am with the Associated Student School in Berkeley. I don't know whether this is the proper time, but I would like to ask for a postponement of this duty, if I may, as our current inventory is going on.

The Court: Well, we will see about that. What is your occupation?

Mr. Carpenter: Consulting engineer.

The Court: Next?

Mrs. Ostrander: Housewife.

Mr. Fiedler: Distributor of Signal Oil products.

Mr. Baker: Construction estimator.

Mr. Nicolaides: General contractor, Burlingame, California.

Mr. Manasse: Self-employed. I am retired. [5]

The Court: What did you do before you retired?

Mr. Manasse: I was a manufacturer of ladies' coats.

The Court: Next?

Mrs. Lucien: Clerk with the Internal Revenue Service.

The Court: Next?

Mr. Novell: Tavern owner.

The Court: Have any of you folks ever been involved in any kind of personal injury action? Yes, sir?

A Juror: I have a lawsuit against me.

The Court: For personal injuries?

A Juror: For personal injuries, yes.

The Court: How did it arise?

A Juror: We won the case.

The Court: What was it, an automobile case?

A Juror: It was a salesman who was hurt in the establishment.

The Court: How was he hurt?

A Juror: I don't know, but I know he claimed he was hurt, but he lost the case.

The Court: Maybe he wasn't hurt.

A Juror: I guess so.

The Court: Do you think that circumstance would affect your judgment one way or the other in this lawsuit? [6]

A Juror: I don't believe so.

The Court: I will say to you, Ladies and Gentlemen, that if you are selected on this jury it will be your duty to try these issues fairly and impartially without any bias or prejudice, any sympathy or passion of any kind or nature whatsoever. It will be your duty under your oaths to try these issues on the evidence which will be received here in the form of testimony from sworn witnesses and perhaps from exhibits in the case, and you are to decide these issues on that evidence and that evidence alone, paying heed, of course, to the instructions which the Court will give you with respect to the law.

Is there any of you here for any reason of any character at all of which you now think who feels

he or she cannot perform this jury duty as I have just instructed you it will be your duty to do?

(No audible response.)

The Court: Is there any circumstance of any kind that you think might embarrass you or that you think might affect your judgment so that you could not decide the case fairly and impartially from the evidence?

(No audible response.)

The Court: All right, gentlemen, do you have any suggestions?

Mr. Melchior: I left some questions with the Clerk, your Honor.

The Court: Yes. Well, I never give them when they are handed up to me. I try to handle the thing in a general kind of way. If you have anything in particular you want me to ask them about, I will see about it.

Mr. Melchior: I would like to know how the jurors feel about women in professional capacities and in Government jobs?

The Court: No, I am not going to ask that specifically. I have told them they are not to have any bias or prejudice, and that they are to decide this case on the evidence only and lay aside any passion, prejudice or sympathy.

Mr. Sedgwick: I have no suggestions, your Honor.
The Court: Exercise your challenges.

Mr. Melchior: Plaintiff will excuse Mr. Novell.

(Ralph J. Novell excused. Frederick L. Wins-
son called to the jury box and sworn.)

The Court: I assume you have been in the court

room all the time I have been talking to this jury, is that correct?

Mr. Winson: Yes, sir.

The Court: Have you heard what the Court has had to say?

Mr. Winson: Yes, sir.

The Court: Do you know anybody at counsel table? [8]

Mr. Winson: I have met Mr. Sedgwick in business years ago.

Mr. Sedgwick: Yes, your Honor.

The Court: How well do you know Mr. Sedgwick?

Mr. Winson: Not well.

The Court: Did he ever do any work for you or your firm?

Mr. Winson: No, sir.

The Court: Do you think your acquaintance with counsel is such that you could not fairly and impartially try these issues from the evidence?

Mr. Winson: I do not.

The Court: What is your occupation?

Mr. Winson: Realtor.

The Court: All right, gentlemen.

Mr. Melchior: I would like to know under what circumstances the gentleman met Mr. Sedgwick.

The Court: Yes, tell us about that.

Mr. Winson: We talked about moving his offices. We didn't do it.

The Court: That was in relation to your real estate business?

Mr. Winson: That's right, sir.

The Court: How long ago was that?

Mr. Winson: A year and a half. [9]

Mr. Sedgwick: I think it was about twice that long.

Mr. Winson: It was.

The Court: Well, all right. Do you have any other suggestions?

Mr. Melchior: No, your Honor.

The Court: Exercise your challenge.

Mr. Sedgwick: We will excuse Mr. Perlee, your Honor, please.

(Melvin S. Perlee excused. Lillian H. Henderson called to the jury box, sworn.)

The Court: What is your occupation?

Mrs. Henderson: Housewife.

The Court: What does your husband do?

Mrs. Henderson: He is division manager for a large trucking concern.

The Court: You have been in the courtroom while the Court has been questioning the jurors?

Mrs. Henderson: Yes, I have.

The Court: You heard what I said to them?

Mrs. Henderson: Yes, sir.

The Court: Have I mentioned anything that you think might affect your judgment one way or the other?

Mrs. Henderson: No, sir.

The Court: You heard the Court say it would be [10] your duty to try the issues fairly and impartially, laying aside all passion and prejudice and sympathy?

Mrs. Henderson: Yes, sir.

The Court: And decide this case only on the evidence that will be received here?

Mrs. Henderson: Yes.

The Court: Do you know any of the people at counsel table?

Mrs. Henderson: No, sir.

The Court: Ever been around the Maurice Hotel?

Mrs. Henderson: No, sir.

The Court: Has anyone else on this jury ever been around the Maurice Hotel, been a guest there? Or are any of you connected with the Western Hotels Corporation?

(No audible response.)

The Court: All right.

Mr. Melchior: If your Honor please, your Honor has not inquired of the jurors with respect to the other defendant, Mr. DeGolia.

The Court: What is his relation?

Mr. Melchior: He is the owner of the hotel.

The Court: Do you know Mr. E. B. DeGolia, who is said to be the owner of the Maurice Hotel?

A Juror: I met him some years ago.

The Court: How long ago? [11]

A Juror: Four years ago, five years ago.

The Court: Is your acquaintanceship with him such that you think your judgment might be affected one way or the other in this case for or against the plaintiff or for or against the hotel?

A Juror: It is not.

The Court: All right.

Mr. Melchior: We will excuse Mr. Winson.

(Frederick L. Winson excused. Vincent B. Johnson called to the jury box, sworn.)

The Court: Have you been in the courtroom while the court has been questioning the jury?

Mr. Johnson: Yes.

The Court: You have heard what I have had to say, is that correct?

Mr. Johnson: Yes.

The Court: What is your occupation?

Mr. Johnson: Manufacturer's representative, contractor.

Mr. Sedgwick: I am sorry, I didn't hear.

The Court: Manufacturer's representative and contractor. What company do you represent?

Mr. Johnson: Vince Johnson Metal Specialties.

The Court: Have you ever been in the Maurice Hotel? [12]

Mr. Johnson: No.

The Court: Are you connected with now or ever been, with the Western Hotels, Inc., the Maurice Hotel or Mr. E. B. DeGolia, who is said to be the owner of the hotel?

Mr. Johnson: No.

The Court: Are you acquainted with anybody at counsel table?

Mr. Johnson: No.

The Court: Ever been engaged in any kind of personal injury lawsuit?

Mr. Johnson: No.

The Court: Has anybody else here? Yes?

A. Juror: Automobile accident. I was defendant.

The Court: In an automobile accident?

A Juror: Yes, sir.

The Court: Anyone else been involved in a lawsuit arising from personal injury?

(No audible response.)

The Court: Do you folks think that your experiences in that lawsuit would affect your judgment one way or the other in this one? Do you think you might be biased or prejudiced either for or against the plaintiff or for or against the defendant in this case?

A Juror: No. [13]

The Court: No. 7, I wish you would speak audibly so the Court Reporter can get it. Do you think you can sit in this case and render a fair and impartial judgment?

Mr. Fiedler: Yes, I do.

The Court: What is that?

Mr. Fiedler: Yes, I can render a judgment.

Mr. Sedgwick: I am sorry, I didn't hear.

The Court: He said he thought he could sit in this case and render a judgment fairly and impartially, without any bias or prejudice of any kind or nature. Is that correct, Mr. Baker?

Mr. Baker: That is correct.

The Court: All right. Exercise your challenge.

Mr. Sedgwick: We will excuse Mr. Manasse, Juror No. 10.

(Herbert L. Manasse excused. Rose M. Cohn, called to the jury box, sworn.)

The Court: What is your occupation?

Mrs. Cohn: Housewife.

The Court: What does your husband do?

Mrs. Cohn: Moving picture operator.

The Court: Do you know any of the folks at counsel table?

Mrs. Cohn: No, sir.

The Court: Are you acquainted with the Maurice Hotel? [14]

Mrs. Cohn: No, sir.

The Court: Have you ever been connected with Western Hotels, Inc.?

Mrs. Cohn: No.

The Court: Do you know Mr. E. G. DeGolia?

Mrs. Cohn: No.

The Court: Have you been in the courtroom while the court has been talking to the jurors?

Mrs. Cohn: Yes.

The Court: Did you hear what the Court said?

Mrs. Cohn: Yes, sir.

The Court: Any reason why you can't sit in this trial and render a fair and impartial verdict?

Mrs. Cohn: I have had a personal injury, an automobile accident.

The Court: Do you think that would affect your judgment one way or the other?

Mrs. Cohn: No.

The Court: Were you seriously hurt?

Mrs. Cohn: Well, not too bad, but then I didn't come to court at all.

The Court: I will ask all of you, each and every one of you, this question again: Is there any reason at all of which you are now conscious which you presently think [15] might affect your judgment

one way or the other in this lawsuit so that you could not fairly and impartially try the issues on the evidence?

(No audible response.)

The Court: All right, gentlemen.

Mr. Melchior: The plaintiff will excuse Mr. Fiedler, Juror No. 7.

(Arthur W. Fiedler excused. Theresa K.

Moran called to the jury box, sworn.)

The Court: Have you been in the courtroom while the Court has been questioning the jury?

Mrs. Moran: Yes.

The Court: Have you heard what I said?

Mrs. Moran: Yes.

The Court: Are you acquainted with anybody at the counsel table?

Mrs. Moran: No, sir.

The Court: Are you acquainted at all with the Hotel Maurice?

Mrs. Moran: No, I am not.

The Court: Or the owner, Mr. DeGolia?

Mrs. Moran: No.

The Court: Have you ever been involved in a personal injury action?

Mrs. Moran: I haven't. [16]

The Court: Any reason why you can't sit fairly and impartially and decide this case on the evidence?

Mrs. Moran: No.

The Court: What is your occupation?

Mrs. Moran: Housewife.

The Court: Your husband?

Mrs. Moran: He is Business Administrator at the

Laguna Honda Home, the City and County of San Francisco.

The Court: All right, gentlemen. The plaintiff has exhausted his challenges.

Mr. Sedgwick: We will excuse Mrs. Cohn, if your Honor please.

(Rose M. Cohn excused. Sheldon D. Smith called to the jury box, sworn.)

The Court: What is your occupation?

Mr. Smith: I am with Pan American Maintenance Schedule.

The Court: Do you know any of the folks at counsel table?

Mr. Smith: No, I do not.

The Court: Have you heard of this action before?

Mr. Smith: No.

The Court: Are you acquainted with the Maurice Hotel or its proprietor?

Mr. Smith: No. [17]

The Court: Is there any reason why you think you could not decide the issues fairly and impartially, without bias or prejudice, for or against this plaintiff or for or against the defendant?

Mr. Smith: No.

The Court: All right. Swear the jury.

(Thereupon, the jury was sworn and an opening statement was made by counsel for the plaintiff.)

Mr. Sedgwick: If your Honor please, may we reserve our opening statement until the close of the plaintiff's case?

The Court: You may. Call your witness.

GENE MAURA COHEN

called as a witness on behalf of the plaintiff, sworn.

Direct Examination

The Clerk: Please state your name, your address and your occupation to the court and to the jury.

The Witness: Gene Maura Cohen, 2827 Hurst Terrace, N.W., Washington, D. C.

Q. (By Mr. Melchior): Have you an occupation?

A. Yes. I am a student.

Q. Miss Cohen, how old are you?

A. I am 19 years old. [18]

Q. What is your occupation, again?

A. I am a college student.

Q. Where?

A. At the University of Rochester in New York State.

Q. Are you related in any way to Mrs. Cohen, the plaintiff in this action?

A. I am her daughter.

Q. Calling your attention to October 14, 1957, do you recall that date? A. Yes, I do.

Q. Where were you at or about 7 o'clock in the morning of that day?

A. We were in the Hotel Maurice in San Francisco.

Q. How did you happen to be there?

A. We were staying in San Francisco at the close of a trip which my mother and I had made for the past week. I had been working and studying in Albuquerque, New Mexico, for the summer,

(Testimony of Gene Maura Cohen.)

because I wanted to find out whether this was the place I wanted to work. My father had done most of his work among the Indians of the Southwest and I wanted to do so also. My mother came to meet me at the end of this two months' period that I was in Albuquerque, and together we were going to make a trip to some places we had visited with my father.

Mr. Sedgwick: May I interrupt, counsel? I have difficulty hearing this witness. May I ask Miss Cohen to speak louder? [19]

The Court: Of course. Unfortunately the acoustics aren't too good in this courtroom. If you will try to lift your voice a little, Miss Cohen.

The Witness: I will try to speak louder. Would you like me to repeat anything I have said?

The Court: No. That is all right.

The Witness (Continuing): Well, we had made a trip for a week together by bus from Albuquerque, New Mexico, to San Francisco, revisiting some of the places we had visited with my father seven years before. We arrived in San Francisco the night before, and our plan was to leave next morning in order to meet my sister, who was finishing work at a music camp on the East Coast.

Q. (By Mr. Melchior): Where were you staying in San Francisco?

A. At the Maurice Hotel.

Q. How long had you been at the Maurice Hotel?

A. We arrived in San Francisco at about 5

(Testimony of Gene Maura Cohen.)

o'clock the night before the accident occurred and checked into the Maurice Hotel.

Q. Had you ever been to the Maurice Hotel before? A. No, sir.

Q. Now, do you recall what the lobby of the Maurice Hotel looked like at 7 o'clock in the morning of August 14, 1957? [20] A. Yes, I do.

Q. Will you tell the jury what the lobby looked like at that time?

A. Well, as you come down the elevator from the upstairs, you arrive in a lobby. The desk is to the left in the back of the lobby. The elevators are on the rear floor of the lobby, on the left side.

As you come out of the elevator you are in the main part of the lobby looking towards the doors on the street.

This lobby has in the center of it two pillars for support, and on the floor are two rugs, one on the near side of the pillars and one on the far side.

Q. Will you describe to us the kind of rugs that were in the lobby that morning?

A. Well, it was not wall-to-wall carpeting. They were separate rugs.

Q. Now, who arrived in the lobby first; you or your mother?

A. My mother was in the lobby before I was.

Q. Then shortly after 7 o'clock did there come a time when you arrived in the lobby?

A. That is correct.

Q. From where did you arrive in the lobby?

A. I came down from our room upstairs on the

(Testimony of Gene Maura Cohen.)

elevator. [21] My mother was waiting in the lobby for me.

Q. And what happened next?

A. Well, we began to walk towards the cab which was parked in front of the door in the street.

Q. Describe the route that you took, where you walked and where your mother walked.

A. Well, we walked through the main part of the lobby between these two pillars, which is where most of the traffic takes place in the lobby of the hotel. My mother was preceding me by about three steps, walking towards the cab.

Q. Do you recall what your mother was wearing and carrying at the time?

A. Yes, I do. She was wearing a gray, two-piece dress with a jacket, regular black shoes, a woman's pocketbook and a small bag on her arm.

Q. And as you walked through the lobby did anything unusual occur?

A. Yes. As we got to the edge of the second rug in the front of the lobby my mother's toe caught in one of the folds of the rug, and she pitched forward and tried to keep her balance, kept walking forward as she was trying to keep her balance, and she wasn't able to regain it, and sprawled in the doorway and hit her knee against the doorsill of the entrance.

Q. Did you see this happen? [22]

A. Yes, I did.

Q. Where were you at the time that this happened?

(Testimony of Gene Maura Cohen.)

Q. Where were you at the time that this happened?

A. I was behind my mother, and when I saw her begin to trip I suppose I couldn't move for the first second or so because my reaction was slow, and then I tried to go around to the side so I could catch her from the front, but I wasn't able to do this in time and she fell before I could get there.

Q. Will you describe your mother's conduct at the instant that her foot caught as you have described it?

A. Well, she was walking in a normal manner and then pitched forward. She tried to catch herself, but couldn't and fell.

Q. And did you see where she landed and with what part of her body she landed?

A. I said she landed in the doorway with her knee hitting the doorsill as she landed there. [23]

* * * * *

Q. Now, calling your attention to the morning after the accident, August 15, 1957, did you return to the Maurice Hotel that morning?

A. Yes, I did.

Q. And who was with you?

A. You were and the photographer, Mr. Lohman. [25]

* * * *

Q. (By Mr. Melchior): Miss Cohen, before recess you said on the morning after the accident you returned to the hotel, and who was present with you?

(Testimony of Gene Maura Cohen.)

A. You were and the photographer, sir.

Q. At that time were photographs of the lobby taken? A. That is correct.

Q. Did you have any part in the taking of those photographs? A. Yes, I did.

Q. What did you do?

A. I showed you and the photographer the condition of the rug at the time of my mother's accident.

Q. When were the pictures taken with respect to your demonstration?

A. These were taken after I had showed you what the rug looked like just at the time of the accident. [26]

The Clerk: Plaintiff's Exhibits 1, 2, 3 and 4 marked for identification.

(Photographs marked Plaintiff's Exhibits 1, 2, 3 and 4 for identification.)

Q. (By Mr. Melchior): Miss Cohen, I will show you Plaintiff's Exhibit 1 and ask you if you recognize it.

A. Yes, I do. This is the lobby of the Hotel Maurice looking out toward the street doors.

Q. Now, can you tell us whether or not that is a likeness of the scene as it was photographed on the morning of August 15, 1958? A. Yes.

Mr. Sedgwick: Just a moment, your Honor, I object to that as immaterial as to what it looked like on August 15th. If she testified that is the way it looked as she saw it before the accident, I would have no objection.

(Testimony of Gene Maura Cohen.)

Mr. Melchior: She has already testified on that morning she made a point of reconstructing the accident—reconstructing the lobby as it was at the time of the accident.

Mr. Sedgwick: I am not sure I understood. Did you say “reconstruct”?

The Court: Yes, he says this lady had a part in fixing the lobby, reconstructing it so that it looked like it did on the morning of the accident and then they made the photographs. [27]

Mr. Sedgwick: I withdraw my objection, your Honor.

Q. (By Mr. Melchior): Is this a picture taken at that time? A. That’s right.

Q. Is that how the lobby looked on the morning of the accident, just at the time of the accident?

A. Yes, it is.

Q. I will show you Plaintiff’s Exhibit 2 for identification and ask you what that is.

A. This is a closeup of the rug in question and the front of the lobby of the hotel.

Q. And can you state the circumstances under which this picture was taken?

A. This picture was taken at the same time.

Q. And can you state whether or not this was also done pursuant to your reconstruction of the scene of the accident at the time of the accident?

A. Yes, that is correct.

Q. Is it such a reconstruction? A. Yes.

Q. I will show you Plaintiff’s Exhibit 3 for identification and ask you what that is.

(Testimony of Gene Maura Cohen.)

A. This is a closeup shot of the doorsill at the front of the hotel, on which my mother's knee hit as she fell.

Q. When was this picture taken? [28]

A. This was taken at the same time, the day after the accident.

Q. And is that also a reconstruction exactly of how that part of the lobby appeared at the time of the accident?

A. Yes.

Q. I will show you Plaintiff's Exhibit 4 for identification and ask you what this is.

A. This is a closeup of the rug as it looked when we reconstructed to appear as it did at the time of the accident.

Q. I will ask you with respect to Plaintiff's Exhibits 1, 2, 3 and 4 whether these are pictures of the scene of the accident exactly as it appeared at the time of the accident.

A. Yes, as nearly as I could reconstruct it.

Mr. Melchior: I offer in evidence Plaintiff's Exhibits 1, 2, 3 and 4.

Mr. Sedgwick: No objection.

The Court: Received.

(Plaintiff's Exhibits 1, 2, 3 and 4 for identification were received in evidence.)

Q. (By Mr. Melchior): Miss Cohen, I am going to hand you a pencil and ask you to mark on the photographs the edge of the rug at the point where your mother fell and to mark the place where she landed after the fall.

(Testimony of Gene Maura Cohen.)

Mr. Sedgwick: Excuse me, your Honor, may I step over here? [29]

The Court: Surely. Has counsel seen these?

Mr. Sedgwick: Yes.

The Witness (Indicating): This is the general area.

Q. (By Mr. Melchior): Mark an "X" at that point.

Mr. Sedgwick: May I ask what "X" is supposed to represent?

Mr. Melchior: Put your initials by this.

(Witness marking photographs as requested.)

Mr. Melchior: Plaintiff has marked Exhibit 2 as the place where—what happened?

The Witness: This is approximately the place where my mother's toe caught in the rug and where she tripped. Do you want me to also mark the place where she landed?

Mr. Melchior: Well, I think you can mark that on some other picture.

The Court: All right. Now what do you want her to do?

Mr. Melchior: I want her to mark the other picture, where she landed. This is on Plaintiff's Exhibit 3.

The Witness: This would be approximately where her knee landed.

(Exhibits handed to the jury.)

Q. (By Mr. Melchior): Miss Cohen, at the time these pictures were taken did anyone come over to join the party, you, the photographer and me? [30]

(Testimony of Gene Maura Cohen.)

A. Yes, the bellman did. He came over there.

Q. How did you know it was a bellman?

A. It was the same person who had carried our bags and assisted us the night before and that morning when we were checking out.

Q. And how was he dressed?

A. In a regular bellman's uniform with the name of the hotel on it.

Q. At that time was there anyone else present other than yourself and the photographer and the bellman and I?

A. No, these were the only people around.

Q. Was anything said at that time, and state who said what?

Mr. Sedgwick: Just a minute. I am going to object to a general question of that kind on the ground that it calls for hearsay and is plainly self-serving.

Q. (By Mr. Melchior): Let me ask you this: Did the bellman say anything at that time?

A. Yes.

Mr. Sedgwick: Just a moment. We will object to that without a proper foundation, your Honor.

The Court: Yes. Lay your foundation, counsel, that is, when and where and who was present.

Mr. Melchior: I think that's in the record, your Honor.

Q. What time did this happen and what place?

A. This was in the lobby of the Hotel Maurice on the morning after the accident occurred. It was

(Testimony of Gene Maura Cohen.)

about 10:30 or 11:00 o'clock in the morning, and the people that I have named were in the party.

The Court: Who were they?

The Witness: You (indicating Mr. Melchior) and the photographer and myself, and at that time we were joined by the bellman who came over to our party.

The Court: Don't tell us yet what he said.

Mr. Sedgwick: If your Honor please, can we know the bellman's name and the photographer's name?

Q. (By Mr. Melchior): Do you know the bellman's name?

A. The bellman's name was Mr. Carter and the photographer is Mr. Lohman.

Q. Do you know my name?

A. Mr. Melchior.

Mr. Sedgwick: I didn't get the photographer's name.

The Court: Lohman.

Mr. Melchior: L-o-h-m-a-n.

Q. What, if anything, did the bellman say at that time?

A. The bellman came to the place where our party was and said, "Well, if it makes any difference, I make a point of watching this rug and seeing that when it gets bunched up it does not stay in a dangerous condition."

Q. Did anyone else say anything at that point?

A. After he volunteered this information [32] Mr. Melchior asked him if this happened——

(Testimony of Gene Maura Cohen.)

Mr. Sedgwick: Just a moment. Are you going to testify to something Mr. Melchior said?

Mr. Melchior: Don't say what I said. Did I say something?

The Witness: Yes.

Q. (By Mr. Melchior): And as a result of that did the bellman say anything else?

A. Yes. The bellman said, "This happens pretty regularly, and I make a point of watching it regularly and straighten it out when it bunches up in a dangerous condition."

Mr. Sedgwick: Just a moment. May I move to strike the "dangerous condition" unless she says it is what the man said?

The Witness: Yes, this is what the bellman said.

Mr. Sedgwick: All right.

Q. (By Mr. Melchior): Did anyone else say anything? Don't state what was said, but just state whether anyone else said anything else after the bellman made that last statement.

A. Not to the bellman.

Q. Did the bellman say anything after that?

A. Yes. He said that when a man's heel catches on the rug the edge of the rug may be raised.

Q. Did he say anything else after that? [33]

A. He said that that happens pretty regularly, that the carpet can become raised.

Q. Did he say anything else after that?

A. Perhaps in answer to further remarks by our party, but I don't remember anything else.

Q. Now, can you describe the type of life with

(Testimony of Gene Maura Cohen.)

respect to physical activity that your mother lived just prior to August 14, 1957?

A. Yes. My mother has led a very active life for as long as I can remember, and she has participated in physical activities such as tennis, swimming, hiking, mountain climbing and boating. She did a great deal of walking. She did gardening, in which she had to bend over and use her hands and knees. And the same thing with some housework. She led a very active life.

Q. And can you state of your own knowledge what kind of a life your mother is leading now with respect to these things?

A. From what I can observe, her activities are markedly limited now. She can no longer participate in any of these activities such as swimming or hiking or mountain climbing, which are so much a part of her life. Even walking to any degree is not comfortable for her. Sitting for long periods of time in travel is not comfortable.

She can't paint any longer. She used to do some amateur painting. And she can't stand on her feet for long [34] periods of time. She can no longer do the gardening or any sort of housework which requires bending or getting down on one's hands and knees.

Mr. Melchior: Cross-examine.

Cross-Examination

Q. (By Mr. Sedgwick): Miss Cohen, did I understand correctly that on the morning after this

(Testimony of Gene Maura Cohen.)

accident you went back to the Maurice Hotel accompanied by your attorney, Mr. Melchior, and a photographer by the name of Lohman?

A. That is correct.

Q. And while there you took and fixed these rugs in the condition shown in these photographs?

A. That is correct.

Q. So you attempted, did you, to put the rugs in the condition that you had seen them before this accident on the morning before? Is that correct?

A. I put them in the condition that I observed them immediately following the accident. I hadn't looked at the rug before the accident, but immediately following the accident, while my mother was still on the ground, I went to see what the trouble was that had caused this accident. From the way I saw these rugs then, we reconstructed them next day.

Q. Then you reconstructed them from your observation of the condition of the rugs after the accident and not before? [35]

A. Immediately following the accident, that is correct, sir.

Q. So that as you walked across the lobby there that morning three paces behind your mother you didn't observe the rugs in the condition as shown in this photograph, did you?

A. I observed her foot catch in the rug. I hadn't looked at the rug before she approached it.

Q. Miss Cohen, when you observed your mother's foot catch in the rug was it in the condition as

(Testimony of Gene Maura Cohen.)

shown in the photographs or not, can you tell us?

A. It was approximately in that condition. I can't tell, of course, whether we have reproduced exactly the same way it was.

Q. What I am asking you Miss Cohen, is whether you observed the rugs in the condition as shown in these photographs before your mother tripped or afterwards.

A. I observed it at the moment that she tripped. I didn't observe it before. I went back to look at them afterwards.

Q. All right. Now, at the moment she tripped did you observe it to be in the condition, say, as shown in Plaintiff's Exhibit 4?

A. I observed a fold in the rug in which her foot caught, sir. I didn't look at the whole rug to see how many folds there were, or anything of that sort.

Q. Do I understand you now, Miss Cohen, to say that you observed a fold in the rug before your mother fell? [36]

A. No, sir. I observed her foot catching on the rug.

Q. Did you observe a fold in the rug?

A. Yes, I observed this fold as her foot caught in it.

Q. Do you know whether or not the fold was caused by your mother's foot or whether the fold was there before your mother reached the rug? Can you answer that question?

A. Would you repeat the question?

(Testimony of Gene Maura Cohen.)

Mr. Sedgwick: Certainly.

(Question read by the reporter.)

The Witness: I don't know how it could be caused by her foot. I observed it at the moment her foot caught in it.

Q. (By Mr. Sedgwick): Were you watching your mother's feet at the time?

A. I was watching my mother. She was ahead of me, sir.

Q. All right. When did you first talk to Mr. Melchior or anyone in his office?

A. I believe we talked with them the evening of the day the accident occurred?

Q. August 14th? A. That's right.

Q. When was the operation on your mother's knee?

A. It was that evening, August 14th.

Q. Was it before or after the operation that you talked to Mr. Melchior?

A. I don't recall, sir. [37]

Q. What time was your plane to leave that morning? A. At 8:45.

Q. And were you going to take the limousine down?

A. We had called a taxi and our bags were in the taxi to go to the airport.

Q. Had you made arrangements to take the regular airport limousine?

A. No. We had a taxi.

Q. Do you know what time the airport limousine was supposed to leave?

(Testimony of Gene Maura Cohen.)

A. I don't know anything about an airport limousine, sir.

Q. Your recollection is that you never had an intention of taking the airport limousine? Do I quote you correctly?

A. Not that I recall. We had our taxi.

Q. Who called the taxi?

A. I believe the hotel called it for us.

Q. And was the reason that you called a taxi that you were to late to make the limousine?

A. Sir, I never take an airport limousine. I don't know. We had no intention of taking the airport limousine.

Q. Now, about how wide would you say that this rug is that your mother tripped on?

A. I would say it is about 9 feet wide from the edge to the doorway. Is that what you mean?

Q. Yes, the width of the rug. [38]

A. Yes.

Q. The length of it is about 30 feet, is it not?

A. That is correct.

Q. Now, was the first time your mother's knee touched the floor or the ground or the rug when it reached the marble portion between the rug and the front door?

A. I would assume so. I don't remember seeing exactly what happened. At a time something like that happens you don't observe every little thing that happens.

Q. You do recall, at least, your mother's knee did hit on the marble and not on the rug?

(Testimony of Gene Maura Cohen.)

A. That is correct.

Q. You recall that definitely, do you? Is that correct?

A. Yes, because I can recall the place where she fell.

Q. Was she partially out the door at the time she landed? A. Yes, she was.

Q. That was the left-hand door as you are facing the street? A. That is correct.

Q. How far out the door did she go?

A. I don't know that measurement in feet. She was partially out the door. Her head and shoulders and waist were out the door.

Q. Did anyone help you fix up this rug for the photographer to take these pictures or did you do that all by yourself?

A. I did this myself. [39]

Q. Did Mr. Melchior help you at all?

A. Possibly he did help me reconstruct this, but it was to my specifications.

Q. In other words, you and Mr. Melchior were down on the floor there and fixed it up the way you recalled seeing it?

A. It didn't require getting down on the floor, sir. Merely lift it with your toe. It came up very easily.

Q. I see. But you did have to lift it with your toes? A. That is correct.

Q. And both of you worked on that, did you?

A. Yes.

(Testimony of Gene Maura Cohen.)

Q. Was anyone else present besides the photographer at the time you were doing that?

A. There were other people in the lobby. The bellman was there. They weren't with us.

Q. Now, you state you recall the bellman—what did you say his name was? A. Carter.

Q. Carter. —came over after you had taken the pictures or before?

A. I don't recall whether we had taken the pictures yet. I believe it was before, but I couldn't be certain.

Q. And he said to you as you were scuffing this rug up so that you could take these pictures, "I make a point of watching this rug"? Do you remember that statement? [40]

A. That's right.

Q. Were those his exact words?

A. As near as I can remember them. He came over to us and said, "Well, if it makes any difference, I make a point of watching and seeing that when this rug gets bunched up it will not remain or stay in a dangerous condition."

Q. He used the term "dangerous condition," did he? A. Yes, he did.

Q. You distinctly remember that?

A. I distinctly remember that.

Q. And he said, "This happens regularly"?

A. Yes, sir. That's right. Those were the words he used.

Q. Did he say what "this" means? Did he mean that somebody falls down or——

(Testimony of Gene Maura Cohen.)

A. He was referring to the bunched-up rug—the bunching above the rug.

Q. He said, “This happens all the time”?

A. No, he used the words “pretty regularly.”

Q. You recall that very definitely?

A. Yes.

Q. Did you make any notes of that conversation?

A. No, I did not.

Q. Did anyone else make any notes of it?

A. I believe somebody else in the party did.

Q. Who? [41] A. Mr. Melchior.

Q. And have you seen those notes?

A. Yes, I have had a chance to see those notes.

Q. When did you last see them?

A. Two days ago.

Q. Did you refresh your memory from those notes in order to testify here this morning?

A. Yes, I did.

Mr. Sedgwick: May I see those notes, counsel? For the record, counsel has handed me, your Honor, a piece of yellow paper purportedly containing notes made in your presence, Miss Cohen, on the morning you took the photographs, or on August 15, 1957; is that correct?

The Witness: That is correct.

The Court: Answer audibly.

The Witness: I said that is correct.

Mr. Sedgwick: I am sorry. I didn't hear.

The Witness: I said that is correct.

Mr. Sedgwick: May I have a few moments to look at my notes, your Honor?

(Testimony of Gene Maura Cohen.)

The Court: Certainly. We will recess while you are doing that.

Ladies and gentlemen, while at recess remember the admonition not to discuss the case among yourselves, not to let anyone else discuss it with you, and don't form or express an [42] opinion until the case is finally submitted to you.

We will recess until two o'clock.

(Thereupon an adjournment was taken until 2:00 o'clock p.m. of this date.) [42-A]

Afternoon Session, December 29, 1958
2:00 O'Clock P.M.

GENE MAURA COHEN

Further Cross-Examination

Mr. Sedgwick: Proceed, your Honor?

The Court: Yes.

Q. (By Mr. Sedgwick): I show you a piece of yellow paper with some writing on it, ask you if those are the notes that you refreshed your memory on before you came to court?

A. Yes, these are the notes.

Q. Thank you.

Mr. Sedgwick: May we offer this as defendant's exhibit, if your Honor please?

Mr. Melchior: No objection.

The Court: May be received.

The Clerk: Defendant's Exhibit A in evidence.

(Testimony of Gene Maura Cohen.)

(Whereupon the yellow sheet of paper with writing on was admitted in evidence as Defendant's Exhibit A.)

Q. (By Mr. Sedgwick): When did you first see these notes, Miss Cohen?

A. These are notes that were made by Mr. Melchior at the time of the conversation with Mr. Carter, the bellman. He made them immediately after speaking with Mr. Carter. [43]

Q. Where did he make them?

A. In the lobby of the Hotel Maurice.

Q. You were present when they were made, were you?

A. I was shown them immediately after Mr. Melchior made them and asked if this is what I remember Mr. Carter having said, and they are what I remembered they said.

Q. This was before you left the hotel?

A. That's correct.

Q. All right. Any of the notes made in your handwriting? A. No, sir.

Mr. Sedgwick: May I read the exhibit to the jury, if your Honor please?

The Court: Yes.

Mr. Sedgwick: Reading Defendant's Exhibit A.

"Dick Carter, bellman, was loading bags in cab, hers. Came back to open door and 'there she was' on her knees. Door more or less closed. Carter said in the presence of Gene, Lohman and K.W.M. he pulls carpet back regularly when it bunches up, watches it and sees that when it bunches up it will

(Testimony of Gene Maura Cohen.)

not stay in dangerous condition (condit.) — pretty regularly—it will flip up only when someone's heel catches on it. Pix 10:30 to 11:00 a.m. 8-15-1957, Dick Lohman, one wide angle shot of lobby, two, detail low angle of carpet lip, three, detail of elevation at door." [44]

Q. What time was your plane to leave that morning, do you recall?

A. Excuse me, could you repeat the question?

Q. Yes. Do you know what time your plane was scheduled to leave that morning?

A. Yes, it was scheduled to leave at 8:45.

Q. Did you come downstairs with your mother?

A. No, I came down after my mother did.

Q. How much time elapsed from the time your mother left the room and you came down?

A. Only a few minutes.

Q. During that time had she paid the bill?

A. Yes, she did.

Q. Had the bellman come up to get your bags to your room?

A. I don't recall whether he came up before she went down or afterwards, but the bags were already gone.

Q. Did you carry them down, you and your mother, or did the bellman come up to your room?

A. The bellman came and took them down for us.

Q. I beg your pardon?

A. I believe the bellman came and took them down for us.

Q. Had he taken them before you left?

(Testimony of Gene Maura Cohen.)

A. Yes, he had.

Q. Was your mother waiting for you?

A. That's right, she had just finished paying the bill. [45]

Q. Where did you start out from, the desk or the elevators?

A. I came from the elevator.

Q. Where was your mother when you came out of the elevator?

A. She was waiting in front of the elevator for me.

Q. You started out together?

A. She was a little bit ahead of me.

Q. Were you in a hurry? A. No.

Q. Were you always at least three steps behind your mother up until the time this accident occurred?

A. I don't recall the exact amount of steps, I was always a little bit behind.

Q. I think you said you were about three steps behind her; is that substantially correct?

A. Yes.

Q. That is your best recollection?

A. That's right.

Q. Can you tell us whether she was walking fast or slow?

A. She was walking at a normal pace, sir.

(Testimony of Gene Maura Cohen.)

Q. Do you recall whether it was her toe or her foot that got caught in the rug?

A. It was her toe, to the best of my recollection, sir.

Q. Did you see that? [46]

A. I saw it as a whole picture. I wasn't watching her foot specifically, but I believe it was her toe that caught.

Q. When you say you believe it was is that something you remember seeing or something you have been told?

A. Something that I remember seeing as a part of a whole picture of someone falling, sir.

Mr. Sedgwick: I think that is all, your Honor.

Redirect Examination

Q. (By Mr. Melchior): Miss Cohen, how soon after the conversation with Mr. Lohman were the notes made that are now Defendant's Exhibit A?

A. The notes were made immediately after speaking with Mr. Carter, the bellman, sir.

Q. How soon after they were made were they shown to you?

A. Immediately after they were made.

Mr. Melchior: That's all.

The Court: Step down.

(Witness excused.)

Mr. Melchior: Mr. Yosiph. [47]

SHAUL P. YOSIPH

called as a witness by the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name, your address and your occupation to the Court and jury.

The Witness: My name is Shaul P. Yosiph.

The Clerk: Where do you live, your office address?

The Witness: 235 West Portal.

The Clerk: San Francisco?

The Witness: San Francisco.

The Clerk: Your occupation?

The Witness: Rugs and carpets.

The Clerk: Dealer in rugs and carpets?

The Witness: That's right.

Direct Examination

Q. (By Mr. Melchior): What did you say your occupation was? A. Rugs and carpets.

Q. What has been your experience with rugs and carpets, when did it start and where did you acquire it, and what work have you done in the field of rugs and carpets?

A. Well, sir, I have been in the rug business since 1927, and at this particular place I have been 19 years, and I worked eight years with Marshall Field in Chicago.

Q. What position did you hold there? [48]

A. I was a salesman of rugs and carpets.

Q. Prior to that time where did you work?

A. I had a business in North Carolina, Charlotte, North Carolina, for four years there.

(Testimony of Shaul P. Yosiph.)

Q. What was the occasion for your leaving Marshall Field in Chicago?

A. I came—it was on a season like this, to visit, to California because I had some relatives in the city and, when I did, I met my wife-to-be, so we got engaged. We got married and we went back to Chicago. We lived there two years and she always told me how beautiful it is in San Francisco and what a good chance for me will be to start a rug business here. So I took her word for it and I came in 1939. We both came back here and I started a business.

Q. What range of experience in connection with rugs and carpets have you covered since 1927? Would you tell the jurors what you know about rugs and carpets and what you have done in that field?

A. Well, sir, my shop is a rug and carpet business. I sell Persian rugs, Chinese, Indian and all types of American-made rugs such as wall-to-wall carpeting or making them in rug sizes, and naturally, with the rug business, you have to sell pads to go under the rugs. So I carry most of the pads to be used in this business and I have some samples to show; if there is need for it, I will be very happy to. [49]

Q. Will you tell the jurors what you know, if anything, about rug installations and spreads?

A. Well, there is two ways of going about this.

Q. I am sorry, Mr. Yosiph; just tell the jury

(Testimony of Shaul P. Yosiph.)

at this time what your experience has been in that field.

A. In this—whenever we use the word “installation,” it always suggests wall-to-wall, where there are tacks into the carpet and goes to all of the area of the room, and the other method of installation is the tackless strip, and these certain strips go around the wall and the carpet goes over these tackless strips and it creates a tension to give a smoothness and very neat looking appeals to the floor covering.

Q. I would like you to tell the jurors—Pardon me for interrupting you—tell the jurors first what experience you have had with respect to how carpets and rugs are placed or spread or installed.

A. Well, that’s what I——

Q. Tell how long——

A. I think that is what I was about to; that is what I was explaining, because the word “installation”, it indicates the area to be covered with wall-to-wall where that tackless strip is or driving tacks into the carpet. When you walk, you see the bottom of the tacks.

The other one is rug sizes, like 9 x 12, 3 x 5 or 10 x 15, or 12 x 18. That is not installed; that is just—you spread the pad and then you spread the rug on top of it and that’s the way it is done.

In other words, there’s two ways of spreading the rug on the carpet—I mean, the carpet on top of the pad. One is in terms of rug size; it could be irregular, it could be regular, could be narrow

(Testimony of Shaul P. Yosiph.)

or wide, could be any kind of size imaginable. But the word "installation" applies to the rug wall-to-wall; either tacks are driven into the carpet, as many of you have in your houses, or it is put down on the top of the tackless strip around about the wall.

Q. Now, would you tell me for how many years you are personally familiar with how carpets and rugs are spread or placed?

A. Well, sir, since 1927. This will be around how many years? Will be 24, 25, 29 years; maybe 30 years.

Q. Have you given public lectures on the subject of rugs and carpets?

A. Yes, I give talks on Persian rugs or carpeting, on carpeting, variety of them, try to give the information to the public, some points to take them with them through my talks as to how to recognize poor carpet from a good one or, if it happen to be Oriental rugs, how to recognize a poor one from a good one.

Q. About how many such speeches have you given to date, Mr. Yosiph?

A. Well, I didn't keep account because it would be more than a hundred times. [51]

Q. That would be fine.

A. I have done it at Lions Clubs, in the Women's Clubs, especially in this city more than any other city because of the length of time I have been here, and I have done it in schools and universities and churches.

(Testimony of Shaul P. Yosiph.)

Q. Have you testified as an expert on rugs in courts before this?

A. I have on two occasions; one occasion was in North Carolina and——

Q. I don't think you have to say what the cases were; just state whether you have.

A. One was in Charlotte——

The Court: You needn't talk about that.

Q. (By Mr. Melchior): All right. Now, did you make an inspection of the lobby of the Hotel Maurice at my request? A. I did.

Q. When did you make that inspection?

A. Somewhere around 1:00 o'clock, between 1:00 and 2:00.

Q. This Sunday?

A. This Sunday, this last—yesterday.

Q. Now, I will show you Plaintiff's Exhibits 1, 2, 3 and 4 in evidence and ask you to look at those exhibits and tell the jury whether the condition of the rug in the lobby of the Hotel Maurice, when you examined it, was the same as it is in these pictures. [52]

Mr. Sedgwick: Object to that, your Honor, as incompetent, irrelevant and immaterial.

Mr. Melchior: I don't think it is immaterial at all; I think it bears heavily on the question of whether his inspection——

The Court: Not what the situation is now, how it compares with what the pictures show. That is wholly immaterial. Objection sustained.

(Testimony of Shaul P. Yosiph.)

Mr. Melchior: May I be heard further, your Honor?

The Court: Yes, out of the presence of the jury. Ladies and gentlemen of the jury, the officer will escort you to the jury room for a minute or two while counsel discusses this with us. While you are out of the courtroom, don't talk about this case with anybody.

(Whereupon the jury retired from the courtroom.)

Mr. Melchior: It seems to me, if your Honor please, that there are two ways in which an expert can bring his expert knowledge to bear on the particular situation. One is by being asked hypothetical questions about evidence testified to by other witnesses, and the other would be by tests and comparisons which the expert makes in order to show that and if the latter is the means used to bring out the testimony and the observations of the expert, then the only way in which such experiments or evidence would be material and [53] admissible would be by showing that the conditions were the same as they were at the time of the accident.

The Court: Tell me, what is the situation?

Mr. Melchior: The situation is this: That the expert looked at these pictures recently——

The Court: I know. What is the situation in that lobby now?

Mr. Melchior: It is just the same as it was at the time of this accident; there is no change.

(Testimony of Shaul P. Yosiph.)

Mr. Sedgwick: It isn't as shown in those pictures, your Honor; that's my point.

Mr. Melchior: The expert, if asked, will testify that he compared those pictures with the lobby at the time he was there and he concludes that the conditions are the same.

The Court: Now, of what interest is that to us whether they are or not?

Mr. Melchior: Well, he did not make his inspection at the time of the accident, he made his inspection recently and he is going to say, he is going to testify as to the unsafeness of the conditions that he found there and——

The Court: Well, I don't think we are going to let him do that. That's a conclusion of your expert, that isn't the subject of expert testimony.

Mr. Melchior: Well, I think experts always testify as to their conclusions on the basis of their expert knowledge. [54]

The Court: Yes, but you left out all of what I said, "it is the subject of expert testimony."

Mr. Melchior: It is under California law, your Honor, if I may show you some authorities.

The Court: What, that a fellow can look at the situation and say whether it is safe or unsafe?

Mr. Melchior: Well, no—well, one of the questions in this case is whether the lobby is reasonably safe, was reasonably safe for the purposes for which it was used, and that is the law of California, that it has to be reasonably safe. There are recent cases which——

(Testimony of Shaul P. Yosiph.)

The Court: Sure, it has to be reasonably safe, but what we do is receive evidence here which paints the picture of the conditions there existing at the important time and then the jury and I decide that question about whether it is reasonably safe.

Mr. Melchior: I respectfully beg to differ with your Honor. Section 1870 of the California Code of Civil Procedure reads in part as follows:

“evidence may be given upon a trial of the following facts:

Subsection 9: The opinion of a witness—” there is an elision, Mr. Reporter—“on a question of science, art, or trade, when he is skilled therein;”

And the authorities under the subject, for instance,— [55]

The Court: That’s a far cry from what we have here.

Mr. Melchior: For instance, Wallace against Speier, 60 California Appellate 2d 387, page 392, a plumber testified as an expert and was sustained on appeal as to the installation of plumbing in a building.

The Court: If you were in the State Court you might persuade me, but you are not. This is a procedural matter here and we follow our own procedure.

Mr. Melchior: I don’t think it is a procedural matter, your Honor.

The Court: Sure it is, admissibility of evidence.

Mr. Melchior: Well, as I understand the rule on evidence, I believe it is Rule 43, it says State

(Testimony of Shaul P. Yosiph.)

rules shall be followed. Where there is a question the rule favoring the admission of the evidence shall be followed. I am quite sure of that. I don't have it with me here. I think your Honor sits here in this matter as a State Judge of the State of California.

Mr. Sedgwick: No, I can't agree with that.

The Court: No, I don't think so.

Mr. Sedgwick: Furthermore, your Honor, this is an attempt to ask this man to decide a case which is what we have a court and jury for.

The Court: That's right. In the first place, I don't believe it's the subject of expert testimony.

Mr. Sedgwick: That's correct, your Honor; I am sure that it is not.

The Court: Here you have a rug lying on the floor in a hotel lobby and you want to have an expert tell us whether the way that rug is laying there is a safe situation. I don't think that is the subject of expert testimony.

Mr. Melchior: Well, all I can say to your Honor is that on the basis of the authorities I have mentioned I have stated what I believe the law to be.

The Court: You haven't presented me an authority yet on this subject. You're talking about a State rule on evidence. Now, where is your authority that this type of thing is the subject of an expert's testimony?

Mr. Melchior: I think with respect to the State rules I think it would be admissible. If your Honor would agree with me on that as to the showing I

(Testimony of Shaul P. Yosiph.)

have made on that point, maybe I can go on to show the relation between the State rule and the function of this court.

The Court: Why do I have to agree with you before you show me?

Mr. Melchior: Well, assuming that to be so, you don't have to agree with me, but passing that point for the purpose of understanding where we are——

The Court: Now, there are subjects on which an expert can give us some help, and we have them do it; medical experts, [57] for example, physicians, chemists. There are many fields in which an expert can give us some real help and indeed do and we can't proceed without them. But on the other hand, there is a whole lot of them that an expert can't help us with at all. It is a matter of common sense, good judgment, and the exercise of one's faculties of observation.

Now, it seems to me that we are now talking about a subject that falls into the latter category rather than the former. In other words, my shorthand way of referring to it is that this subject is not the subject of expert testimony. An expert can't help us on it, we don't need him and anybody can take a look at that thing and tell us just as much as this man can. As a matter of fact you have photographs. The jury can look at those photographs, I can look at them. Why tell this man to go up and take a look at that rug on that floor and then come in and say to the jury that is an ex-

(Testimony of Shaul P. Yosiph.)

tremely dangerous situation when the jury is just as able to observe that situation as he is.

Mr. Melchior: Well, if the Court please, this man would, if he were permitted to testify, make demonstrations here in court as to the type of mat which must be placed under a carpet or rug which is not fixed to the floor. This would be a matter of expert testimony, and we will testify as an expert that the mat that is placed under this rug, that was under the rug at the time of the accident, is a mat which [58] causes a tendency to slip and which causes the rug to slip.

The Court: There is no evidence here that the rug slipped. Your whole case is that it was lifted up.

Mr. Melchior: And that the slipping causes loops and wrinkles as people walk on it, leaving the rug after the slippage in a looped and wrinkled condition, and that will be his testimony and I believe that is a matter for experts to testify as to the effects on the type of weave of a rug with respect to the kind of mat that lies on the floor and the kind of binding qualities which one mat or another may have, if a rug is installed as a fixed installation or whether it is merely spread on the floor, whether it is tacked down or not. There are people that specialize in this sort of thing and it is not a matter for lay knowledge at all.

The Court: That isn't what you are talking about. The point of evidence that I ruled on, to which you asked permission to address yourself, was whether he should be permitted to say whether

(Testimony of Shaul P. Yosiph.)

these photographs show the same condition as existed up there yesterday or the day before, whenever he went up and looked at it. Now, on that point, that is the only point at this juncture. On that point, I think that's immaterial.

Mr. Melchior: Well, he is going to testify as to what the—if he were permitted to testify, he would testify as to the safety of the condition as he found it, which I have got to connect up. [59]

The Court: You can have a ruling on that, and that is, that is not a subject of expert testimony and I shall not permit him to testify whether it is safe or isn't safe. Now, beyond that, we will decide that when we get to it.

If you are talking about textures of carpets and pads, why, that may be something else again, I don't know about that; but on the two points I think it is pretty clear you are not entitled to have the witness say anything at all about what the condition is today; it's immaterial what the condition is today. You mean you want to show that these fellows are still maintaining a terribly dangerous situation?

Mr. Melchior: That's not my interest at all, your Honor. My only interest is to tie up this man's observations and experiments with the time of the accident.

The Court: Well, he is looking at photographs. Now, that is all he sees.

Mr. Melchior: He obviously wasn't there at the time of the accident.

(Testimony of Shaul P. Yosiph.)

The Court: Of course not, but you have photographs of the condition. You can ask him about those photographs. You can't ask him if it is dangerous, I won't permit you to do that; but you can ask him about anything that is a proper subject of an expert examination. But that is ordinary horse-sense judgment that anybody can make and we don't need the [60] expert help on it. I am not going to have you ask him that question.

You can make a speech to the jury at the proper place, Mr. Melchior, only don't need this witness to do it.

Mr. Melchior: Well, in my opinion, your Honor, he can testify to it for the reasons that I have indicated. I don't wish to belabor the point but I do want to preserve it for review, if necessary.

The Court: You have got it.

Mr. Melchior: I think I have it now, don't I?

The Court: Yes.

Mr. Melchior: May I make a formal offer of proof at this point, just to have the record clear?

The Court: Haven't you already done it?

Mr. Melchior: All right, fine. And may I be clear on your Honor's ruling so we don't have to take the jury out again? Your Honor's ruling is he may testify as to conditions of the adhesive quality——

The Court: He can testify to what he saw, as he saw it at the time and place in question. He can look at these photographs and I don't see how he is going to help you with those and tell us what

(Testimony of Shaul P. Yosiph.)

he sees there, if that is of any assistance to you, but if you are going to ask him to say that was a terribly dangerous situation or a dangerous situation, I am not going to let you do that and I am not going to let you [61] ask him whether what he sees in this photograph is what he saw yesterday when he went up and looked at the hotel lobby. Telling us what the conditions are up there today or were yesterday or were at any time, except the morning of the accident, is immaterial.

Mr. Melchior: May I ask him if what he sees in these photographs is, in his expert opinion, a safe or unsafe condition?

The Court: Certainly not; that is exactly what we have been talking about.

Mr. Melchior: Well, the problem of time is one problem, and the problem of range is another.

The Court: I am not talking about time; I am talking about this being a question which is not a proper expert witness question.

Mr. Melchior: I obviously——

The Court: You know, I have an idea you're a better expert on that subject than he is.

Mr. Melchior: I am not a——

The Court: You fellows who try these personal injury suits are——

Mr. Melchior: This is my first one, your Honor.

The Court: Is it?

Mr. Melchior: Yes, I am a tax lawyer. It really is. Mrs. Cohen is a social acquaintance of mine. This is my first such case. [62]

(Testimony of Shaul P. Yosiph.)

The Court: Well, you are doing all right.

Mr. Melchior: Thank you.

The Court: I think I must sustain—You do object to that?

Mr. Sedgwick: Oh, yes, your Honor.

The Court: I am assuming he has made an offer of proof and in a proper procedural way, and I suppose you would make the same objection?

Mr. Sedgwick: Yes, your Honor, I will object, your Honor, on the ground that it is incompetent, irrelevant and immaterial, not a proper subject of expert testimony and this man has not been, as yet, at least, qualified as an expert on the subject to which these questions have been placed.

Mr. Melchior: May I have a ruling on that last subject separately, your Honor?

The Court: Objection sustained.

Mr. Melchior: On the qualification of the witness?

The Court: On the subject you are talking about. I mean, I just don't think this is the subject of expert testimony so how are you going to qualify him?

Mr. Melchior: In other words,—

The Court: He may be an expert in rug texture, that sort of business, and I am not prohibiting him from testifying about that, but if you want to ask if this is a safe or unsafe situation, I say to you that is not a proper subject for expert testimony.

Mr. Melchior: Well, I am very sorry that your Honor feels that way. I feel that I have done all that I can to persuade you and, if the case is going

(Testimony of Shaul P. Yosiph.)

to hinge on it, it's very unfortunate but I don't see what else I can say.

The Court: Well, the case isn't going to hinge on it; all I am doing is making a ruling on a motion you made.

Mr. Melchior: It may or may not hinge, but it may.

The Court: Well, we will see about that.

Mr. Melchior: All right.

The Court: Bring in the jury.

(Whereupon the following proceedings were had in the presence of the jury.)

Q. (By Mr. Melchior): Mr. Yosiph, I show you Plaintiff's Exhibit 3 and ask you to look at the rug. Is that what is known as a Chinese rug?

A. It is a Chinese pattern rug.

Q. And is that a free-lying rug or is that a rug which is in some manner fastened to the floor?

A. No, this is just loosely thrown on the top of the floor.

Q. Now, from your experience, Mr. Yosiph, do you know what are the qualities of adhesion to the floor surface of rugs which are called Chinese rugs? How should they be properly and safely placed on the floor?

The Court: You have asked two or three questions there. [64]

Mr. Melchior: All right.

Q. From your experience, what are the properties of adhesion to a floor surface of loosely placed Chinese rugs?

(Testimony of Shaul P. Yosiph.)

Mr. Sedgwick: I will object to that, your Honor, on the ground that the foundation has not been laid for this question. There may be many types of Chinese rugs. We don't know whether this man has performed any experiments or whether he is in the business of experimenting with cohesion, the coefficients of friction and things of that kind.

The Court: Well, all he said was that this was a Chinese pattern.

Mr. Melchior: No, I asked him whether it was a Chinese rug.

The Court: Well, if you will read his testimony back, Mr. Reporter.

Mr. Melchior: All right, I can straighten that out.

The Court: Well, let's see what he said. Will the reporter read it, please?

(The answer was read as follows: "It is a Chinese pattern rug.")

The Court: That is a far cry from what you are talking about.

Q. (By Mr. Melchior): Mr. Yosiph, in the rug business, [65] is there such a thing as a special kind of rug known as a Chinese pattern rug?

A. Yes, there is rugs that is known by the name of Chinese pattern rugs.

Q. Will you describe the kind of a rug that this is?

A. This is 91½ wide by 30 feet long.

Q. I don't mean this particular rug; what is a Chinese pattern rug?

(Testimony of Shaul P. Yosiph.)

A. Well, each rug has its own pattern, so if there will be a hundred different rugs, there will be one hundred different patterns, as far as speaking on the basis of pattern. There is no limitation to them; it's wide open. So it is with Persian rugs; so it is with Chinese.

Q. In other words,—

A. Being specific, this rug was 9½ wide, 30 feet long and it was loosely thrown on the top of the pad, crossways but—By the way, when I saw the rug, there was a pad, a rubber pad across it. In other words, I didn't see the situation as it was in the pictures because, when I went there and I saw a pad across the rug—as you walk, in other words, your feet will touch the rubber pad, not the rug, so that was something new to me there.

Q. Now, my question right now is: What is a Chinese rug as distinguished from any other kind of rug?

A. Chinese rugs are hand-made and they are patterned [66] different than any other type of rug in relation to the Persian or to the rugs made in this country, they are machine-made, so there is a distinction between the Chinese rug and any other country or machine-made rug.

Q. Was the rug itself, you saw in the picture, a Chinese rug? A. I would think it is.

Q. What experience have you had with respect to the way in which Chinese rugs should be placed on floors? State your own experience, please.

A. It is necessary the rugs should have a—

(Testimony of Shaul P. Yosiph.)

Mr. Sedgwick: Excuse me, Mr. Yosiph. Pardon me, your Honor, his question was?

The Court: "What is your experience"?

You don't seem to understand the word "experience."

Mr. Melchior: I can't hear your Honor. The echo.

The Court: I was saying to the witness that he doesn't seem to understand the word "experience."

Mr. Melchior: Thank you.

The Court: Now, you are going to have to get at it in some other way than by asking him about his experience because, as soon as you do, he starts to describe the rugs and one thing or another.

Q. (By Mr. Melchior): Mr. Yosiph, what do you know, on the basis of all of your years in the business——

The Court: That's going to get him right back——

Q. (By Mr. Melchior): Not this rug, but [67] Chinese rugs in general, how they lie and are placed on floors.

A. Well, I would use the word "experience" because I have confidence in myself to understand the word "experience." My experience teaches me the rug should have a pad.

The Court: Well, you see, that isn't what he asked you at all. You understand "experience" in one sense and counsel is asking about your experience in another sense. What he means by "experience" is, how many years have you dealt with rugs. How many years?

(Testimony of Shaul P. Yosiph.)

The Witness: Thirty years.

The Court: What did you do, did you make rugs, did you sell rugs?

The Witness: I sold rugs. I repair rugs, I clean rugs, I lay rugs.

The Court: For 30 years?

The Witness: Thirty years. That is the only way I make my living.

The Court: All right. Now we are getting there. Now, go on from there. I don't want to examine him.

Q. (By Mr. Melchior): Now, what do you know, on the basis of these 30 years, Mr. Yosiph, about how Chinese rugs lay on the floor?

Mr. Sedgwick: I am going to object to that, your Honor; incompetent, irrelevant and immaterial, not the subject of expert testimony. [68]

The Court: Well, I think so, Mr. Melchior. In the first place, I don't know anything about this Chinese business yet, because all he says is that rug has a Chinese pattern. Now, the pattern hasn't got a blamed thing to do with how the rug lays on the floor, how it adheres to the floor or doesn't adhere to the floor. It doesn't make a bit of difference. That is all he says: This is a Chinese pattern rug.

Q. (By Mr. Melchior): Mr. Yosiph, I show you a picture of a rug again. This time I will show you Plaintiff's Exhibit 4. Is that a Chinese rug?

A. It is.

Q. Are Chinese rugs different from other rugs?

The Court: Let's find out what he means by a

(Testimony of Shaul P. Yosiph.)

“Chinese rug.” What do you mean by a Chinese rug?

The Witness: A Chinese rug is made in China. It is made by hand. Just like you say, “What is an American rug?” I will say it is made by machine, the wool is spun by machine, it is woven into a rug by machine. And the Chinese rug also is different than a Persian rug or a Turkish rug because of the peculiar pattern and colors. Therefore, when I see a Chinese rug, immediately I distinguish it from the rest of all the rugs that I know, regardless where they are made.

The Court: What distinguishes it? [69]

The Witness: It is the peculiarity; it is the outline, its construction, its adaptation of color and pattern.

Q. (By Mr. Melchior): Is there anything in the weave of a Chinese rug which distinguishes it from other rugs? A. It does.

Q. What is that?

A. It is—being hand-made, it is very hard for me to give words to describe. It is just like here we are about 20 people and we have a pen—I have to answer your question in the terms of an illustration that I am about to say, and we have given a pen and to write one sentence and all of us have the same ink, the same pen, all our handwriting will be different, yet we wrote the same sentence. Chinese rug is the same way; Persian rug is the same way. If we have all the yarn, all the pattern, each weaver differs than the other because you have

(Testimony of Shaul P. Yosiph.)

the characteristic of something that is made by hand, so I cannot be too accurate about how to differentiate a Chinese rug from a Persian or a Persian rug from an Indian rug or an Indian rug from any other hand-made rugs, because they all have peculiarities and each has a pattern of its own.

Q. In other words, is the hand-made rug, as against the machine-made rug, which makes the difference in the way in which the rug lies; is that right? A. That is right.

Q. This was a hand-made rug, was it, in the pictures? [70] A. That is right.

The Court: I am afraid you testified, counsel, not the witness.

Mr. Sedgwick: Your Honor, could we ask that the last question and answer be read?

The Court: You couldn't hear?

Mr. Sedgwick: I couldn't get it; they were both arguing, talking at the same time.

The Court: All right, would you read the last question and answer?

(Record read.)

Mr. Sedgwick: That is the part that I missed, "the way it lays on the floor." I asked that it be stricken for the purpose of the objection on the ground that it is leading and suggestive, and the answer be stricken for the purpose of the Court's ruling.

The Court: The answer is stricken. The objection is sustained. It is leading and suggestive.

Q. (By Mr. Melchior): Mr. Yosiph, will you

(Testimony of Shaul P. Yosiph.)

state whether there are special qualities about floor adhesion, about lying on the floor, of certain kinds of floor coverings as distinguished from other kinds? A. Yes.

Mr. Sedgwick: Just a moment, please, Mr. Yosiph. I am going to object to that, your Honor, as the subject of [71] expert testimony, first, upon which this witness is not shown to be qualified as an expert; secondly, it is not the proper subject of expert testimony. Certainly the qualities of adhesion—he has not been shown to be an expert on that, or that any tests were made as to this particular rug, or anything of that kind.

Mr. Melchior: It is not a matter of tests, your Honor. This is a general question which is part of the setting in which the expert testimony is required.

The Court: Really preliminary, then?

Mr. Melchior: Really preliminary.

The Court: Overruled. You may proceed.

Q. (By Mr. Melchior): You recall the question, sir?

The Court: Read it to him.

(Record read by the reporter.)

Q. (By Mr. Melchior): What are the special qualities and what types of rugs possess—floor coverings, excuse me—which type of floor coverings possess which qualities of adhesion?

Mr. Sedgwick: Just a minute, please. There are two questions there; first, are there differences, and then, what are the differences?

(Testimony of Shaul P. Yosiph.)

Mr. Melchior: I think I should choose the first question. The question now is——

The Court: This witness is going to have a lot of [72] trouble unless you just ask him one thing at a time.

Mr. Melchior: All right.

The Court: Make it as simple as you can.

The Witness: I would appreciate it.

Q. (By Mr. Melchior): What, Mr. Yosiph, if anything, are the special qualities of lying on the floor of different classes of floor coverings?

A. I would like to ask this permission——

Mr. Sedgwick: Excuse me. I hate to be popping up and putting up my hand, but I must stop you. We now object, your Honor, this is not the proper basis of expert testimony, one; two, that it is incompetent, irrelevant and immaterial; and three, that this man has not been qualified as an expert on the coefficient of friction or anything of that kind, or that any foundation has been laid of any tests of this rug. The question of what some other rug might do, I think, is completely immaterial on some other surface.

Mr. Melchior: Your Honor please, the question is as to the various types of rugs and the witness has stated to which class or type of rug this particular rug belongs. He is qualified to testify on that subject on the basis of 30 years' experience in installing various kinds of floor coverings.

The Court: We are not talking about whether he knows rugs, floor coverings; we are talking about

(Testimony of Shaul P. Yosiph.)

the adhesive quality, or the lack of it, of this particular rug. [73] Now, did he make any tests?

Mr. Melchior: He has not made any tests, your Honor.

The Court: How does he know that? How can he help us?

Mr. Melchior: He will testify—Should this be out of the hearing of the jury?

The Court: Well, I have heard most of it. I don't think it is going to help us to talk to me about this, with the jury out in the jury room, any further. If you can ask this witness a question that is a proper question, we will let him answer. Now, I don't want to limit you. If there is anything at all that he can help us with, we want to hear it. Now, let's see if there is anything he can help us with. I must say I am somewhat doubtful about it, but I am not going to limit you.

Q. (By Mr. Melchior): Mr. Yosiph, have you made tests as to how Chinese rugs should lie freely on the floors?

Mr. Sedgwick: Your Honor, that's purely a conclusion of this witness.

The Court: No, he is asking if he has made tests.

Mr. Sedgwick: Excuse me.

The Court: That is a proper question. The objection is overruled.

Did you ever make any tests about rugs lying on the floor? [74]

The Witness: Your Honor, may I say just one

(Testimony of Shaul P. Yosiph.)

word in reference to the word "test" and to the one word "adhesive"? These are two scientific words. I don't want to be involved in them. Why shouldn't we talk plain English, put the pad and put the rug on top of the pad? That is the question to be discussed. Adhesive tests—I am not a laboratory.

Q. (By Mr. Melchior): Just a minute.

The Court: Well, you see, counsel, your witness now tells us he isn't qualified to do that.

Mr. Sedgwick: That's right.

The Court: He said all he knows, you put a pad on the floor.

Q. (By Mr. Melchior): Mr. Yosiph, do you know what happens if various kinds of pads are placed under loose Chinese rugs? Do you know what happens then? A. Yes, it depends——

Mr. Sedgwick: Just a minute. You have answered the question.

Q. (By Mr. Melchior): What kind of pads are there which can be placed under such rugs?

Mr. Sedgwick: Just a minute. Your Honor, that is completely immaterial in this case, what kind of pads have to be placed. We are dealing with one rug and one pad and we are dealing with something that people are generally familiar with and it is not the subject of this type of expert testimony.

The Court: Well, your own witness, [75] Mr. Melchior, says he doesn't want to get into that because he doesn't know anything about it. He is no laboratory, is his phrase.

(Testimony of Shaul P. Yosiph.)

Mr. Melchior: Obviously he isn't a laboratory man, your Honor, but he has the experience. The words "adhesion" and "test" may smack of the laboratory, but they really mean nothing other than "Did you try it, and how does it lie on the floor?"

Mr. Sedgwick: No, no, no, no. I am going to ask that that remark be stricken, your Honor.

The Court: Yes.

Mr. Sedgwick: That is testimony of Mr. Melchoir.

The Court: Counsel's statement.

Q. (By Mr. Melchior): Mr. Yosiph, what is a foam rubber pad?

A. There are several kinds of foam rubber. I could tell by the way the term is applied to them. For instance, foam rubber, sponge rubber, solid rubber, and there are some pads are rubberized rubber; they are not 100% rubber; so there are these different types of rubber pads used on the market, in my shop as well as in any other shop.

Q. Is there such a thing in the rug and carpet business as a foam rubber pad with molded ridges?

A. Yes, there is pads completely 100% rubber pads and there are pads covered with a rubber, the top and the surface, [76] and there are other pads that are made of rubber, but they have a lining on the surface of the rubber to give a little bit solidity to it, little bit protective, because otherwise it will be spreading.

Q. The question right now is, what is a foam rubber pad with molded ridges? What sort of a thing is that?

The Court: That's not involved in this case, is it?

Mr. Melchior: Yes, it is, your Honor.

The Court: Is it? There's no evidence here that it is. This man can't help us on that subject because he wasn't there at the time of the accident so there is no evidence in this case of that sort of thing. You are getting outside of the evidence.

Mr. Melchior: I think I would like to address the Court out of the hearing of the jury; I think it is time for a recess.

The Court: Oh, you do?

Mr. Melchior: I am sorry; I beg your pardon.

The Court: I am in the habit of deciding that one myself.

Mr. Melchior: I am very sorry, your Honor.

The Court: That's all right.

Ladies and gentlemen, the Court Officer will take you to the jury room. Don't talk about this case while you are out. [77]

(The jury retired from the courtroom.)

Mr. Melchior: I certainly didn't intend any such implication.

The Court: No offense; you don't need to say anything about it.

Mr. Melchior: The problem that I have now, your Honor, is that I appreciate that this is not in evidence because of the ruling that your Honor has made that he can testify to what he observed, but if I may recall the young lady, I think she can testify as to the kind of pad, if I may do that.

The Court: All right. Well, we will take a short recess. That is a good suggestion.

(Recess.)

Mr. Melchior: With your Honor's permission I would like to withdraw the witness briefly and put Miss Cohen back on the stand.

The Court: You may do so.

GENE MAURA COHEN

recalled, having been previously sworn, testified as follows:

The Clerk: Will you please restate your name for the record?

The Witness: Gene Maura Cohen.

Further Direct Examination

Q. (By Mr. Melchior): Miss Cohen, you testified earlier that immediately [78] after the accident you took a look at the edge of the carpet; do you recall that? A. Yes, that's correct.

Q. Did you observe anything at that time about the manner in which the carpet was placed with respect to any covering that might have been under it?

A. Yes, the carpet was longer than the pad which was underneath it and supposed to hold it on the ground. It was—I don't know exactly how much longer, but I'd say about four or five inches and it was extending beyond the pad.

Q. Was that condition the same the next day when the pictures were taken?

(Testimony of Gene Maura Cohen.)

A. Yes, it was.

Q. I will show you Plaintiff's Exhibits 1, 2, 3 and 4. Can you show on those pictures where, according to your observation, the mat under the rug extended? If you can, I would like you to mark that.

A. (Witness marking.) I am not sure of the exact place because of the perspective of the pictures.

Q. All right, if you are not sure, then don't mark them.

Mr. Sedgwick: We will object to the marking if she is not sure.

Q. (By Mr. Melchior): If you are not sure, don't mark it.

The Court: Let me see those pictures. [79]

Mr. Melchior: I am sorry, your Honor.

Q. What was the appearance of the part where the mat did not extend to the length of the floor—to the length of the carpet, I beg your pardon?

A. Could you repeat that question, please?

Q. What did it look like at the place where you testified the mat was short of the edge of the carpet?

A. Well, the carpet was raised at this point.

Mr. Melchior: That's all.

Mr. Sedgwick: I have no questions.

The Court: Step down.

(Witness excused.)

Mr. Melchior: All right, Mr. Yosiph.

SHAUL P. YOSIPH

Further Direct Examination

Q. (By Mr. Melchior): Mr. Yosiph, what is the effect of having a mat under a loose-lying rug which is four to five inches short of the edge of the rug?

Mr. Sedgwick: Just a moment. It would seem to me this is entirely not the subject of expert testimony, that is a matter of common knowledge. We don't know any of the particulars. Object on the ground——

The Court: You are not talking about this case so it is immaterial.

Mr. Melchior: May I have the pictures? [80]

The Court: Here they are.

Q. (By Mr. Melchior): Mr. Yosiph, I show you Plaintiff's Exhibit 1. Assuming that Plaintiff's Exhibit 1 shows a carpet laid in a public place with a mat under the carpet and the mat extending four to five inches short of the edge of the carpet on the side facing you in the picture, and based upon your 30 years' experience in laying carpets, what would be the effect of such a position of the carpet and mat as to the safety of the rug for purposes of having people walk on it?

Mr. Sedgwick: Just a minute. Object to that, your Honor, as incompetent, irrelevant and immaterial, not the proper subject of expert testimony on which this witness has not been qualified as an expert; on both grounds.

The Court: Sustained. That is the same question

(Testimony of Shaul P. Yosiph.)

we talked about while the jury was out, Mr. Melchior. Exactly the same question we ruled on once.

Mr. Melchior: Excuse me a moment, your Honor.

The Court: Surely.

Q. (By Mr. Melchior): Mr. Yosiph, assuming that in a public hotel lobby a rug is laid as shown in Plaintiff's Exhibit 1, which you hold in your hand, and assuming that a mat lies under that rug which extends four to five inches short of the edge of the rug——

The Court: You say forty-five?

Mr. Melchior: Four to five inches short of the edge of the rug. [81]

Q. (By Mr. Melchior) (Continuing): And assuming that a person weighing 150 pounds had walked across that rug carrying baggage in the direction from the pillars which you see in the picture to the door, what would be the effect of those facts upon the way in which the edge of the rug adheres to the floor?

Mr. Sedgwick: Just a moment, please. Your Honor please, I sound like a broken record but it is incompetent, irrelevant and immaterial, no proper foundation laid, not the proper subject of expert testimony, calling for the opinion and conclusion of this witness, invading the province of the jury and an improper hypothetical question not based on any proper hypothesis in the evidence in this case.

The Court: Sustained.

Mr. Melchior: Cross-examination.

Mr. Sedgwick: I have no questions.

The Court: Step down.

(Witness excused.) [82]

* * * * *

LUCY K. COHEN

the plaintiff herein, called as a witness in her own behalf, sworn. [85]

* * * * *

Direct Examination—(Continued)

Q. (By Mr. Melchior): Mrs. Cohen, where do you reside? [131]

A. In Washington, D. C.

Q. Do you also have any other names by which you are known?

A. Yes; my married name, Mrs. Felix Cohen, and my maiden name, Lucy Kramer.

Q. When were you born, Mrs. Cohen?

A. May 22, 1907.

Q. And will you tell the jury what your education and——

The Court: Mr. Melchior, I think if you will lift your voice a little the jurors will appreciate it.

Mr. Melchior: Yes, your Honor.

Q. Will you tell the jury what your education and employment are?

A. Well, I have my B.A. from Barnard and my M.A. in mathematics from Columbia and most of my points for a doctor's degree, but I never concluded my doctor's degree.

(Testimony of Lucy K. Cohen.)

Q. I am having some trouble hearing you, Mrs. Cohen? A. I am sorry.

The Court: If you will just sit back and lift your voice so that the last juror in the box can hear you, we will get along better.

Q. (By Mr. Melchior): Will you repeat your answer, please?

A. I have my B.A. from Barnard College and my M.A. from Columbia University and all my credits for a doctor's degree, which I haven't yet taken, from Columbia University. I taught [132] mathematics for a short time before I went to live in Washington with my husband. I now am employed at the Public Health Service in Washington, D. C., in the Government.

Q. Where were you employed on August 14, 1957?

A. The President's Committee on Scientists and Engineers.

Q. Is that an agency of the United States Government? A. Yes.

Q. What was your salary at that time?

A. It was what is called a GS-13. \$8,990 per annum.

Q. \$8,990 per annum? A. Yes.

Q. And where were you on August 14, 1957?

A. I was in San Francisco.

Q. What status were you on at that time with respect to your employment?

A. I was on my vacation. I had a few days' leave—annual leave.

(Testimony of Lucy K. Cohen.)

Q. How long had you been away from your office?

A. From about the 7th of August. Just a week.

Q. Would you describe where you had been and what you were doing and what you were doing in San Francisco?

The Court: Well, I don't believe that has any importance in this lawsuit, does it, Mr. Melchior? Let's get to the morning at the Maurice Hotel.

Mr. Melchior: It has importance insofar, your Honor, as—— [133]

The Court: That she is an active woman?

Mr. Melchior: That she is an active woman, yes.

The Court: Well, she can tell us about that.

The Witness: I will try to be as brief as I can.

My daughter had been studying and working in Albuquerque, New Mexico, and she asked if I couldn't possibly spend my week's vacation with her going over some of the old ground that she and my husband and the younger child had done some seven years before while he was alive.

We went from Albuquerque to Gallup, to the Gallup Indian ceremonials, which I had never seen.

Q. (By Mr. Melchior): The what?

A. The Gallup Indian ceremonials, which I had never seen. Then we went by bus from there to Los Angeles, and from there to Yosemite National Falls, which I had never seen.

The Court: Well, see, this is going over the same territory. You don't need to corroborate Mrs.

(Testimony of Lucy K. Cohen.)

Cohen's daughter's testimony. She testified to all this.

The Witness: I am sorry.

Mr. Melchior: Very well.

Q. When did you first arrive at the Maurice Hotel in San Francisco?

A. I think about five-thirty on Tuesday, August 13th.

Q. Was that the first time you had ever seen the Maurice Hotel? [134] A. Yes.

Q. How did you happen to be there?

A. It had been recommended to us very highly by an acquaintance, someone who had used it for many years, and I wrote to the Maurice and reserved a room for that one night.

Q. I would like to show you a paper and ask you what this paper is.

Mr. Sedgwick: Excuse me. May I see the paper?

Mr. Melchior: I beg your pardon, sir.

The Court: Is this something to do with the date she was there?

Mr. Melchior: It is a confirmation of her reservation.

The Court: Well, you don't need that. Is there any doubt in this lawsuit that she was there?

Mr. Sedgwick: No, your Honor. We don't question that.

The Court: All right.

Mr. Melchior: All right, we will just go ahead.

Q. How did you spend the night from August 13th to August 14th?

(Testimony of Lucy K. Cohen.)

A. Well, shortly after we arrived we made ourselves comfortable, and then a friend came to call for us and took us sightseeing, took us up to Coit Tower, I think it is.

Q. What time did you retire? [135]

A. We retired, oh, I would say about ten-thirty, after dinner.

Q. And what time did you arise in the morning?

A. Well, I can't say exactly, because I never use an alarm clock, but it must have been fairly early. I usually arise early.

Q. And what was your purpose that morning? What were you intending to accomplish?

A. We were to take a plane, a TWA plane, on our return to Washington on our way East to pick up my younger daughter.

Q. Do you recall the time that the plane was to leave and where your destination was?

A. We had reservations on the plane that left at 8:45, a TWA plane, to arrive in Chicago sometime that afternoon. I don't know exactly what time unless I have the timetable.

Mr. Sedgwick: Would your Honor pardon me a moment? Counsel has handed me several papers. I would like to see what they are.

The Court: I don't think you need to put in the airline schedule. It appears that that is what it is.

Mr. Melchior: One is an airline schedule, your Honor, and the other, your Honor, are notes in Mrs. Cohen's handwriting made prior to this time,

(Testimony of Lucy K. Cohen.)

indicating the time of the plane. There was some point about whether she was taking a plane——

The Court: Well, let counsel look at that [136] and see if you can't say what time the plane left.

Q. (By Mr. Melchior): Mrs. Cohen, I am going to hand you a paper and ask you to identify that paper if you can.

A. Yes, sir. That is a note I made in Washington at the time we were arranging the trip, giving the dates and times of reservations and what planes I was planning to take, and so on. Also, the name of the hotel which had been recommended by a friend, and the friend's name in Tulsa, Oklahoma.

Q. Are these notes you made prior to arriving in San Francisco? A. Oh, yes.

Mr. Melchior: I would like to offer the document identified by the witness as Plaintiff's Exhibit 8.

Mr. Sedgwick: No objection.

The Court: Received.

(Note made by plaintiff marked Plaintiff's Exhibit 8 in evidence.)

Q. (By Mr. Melchior): I will show you another paper, Mrs. Cohen, and ask you to identify it.

A. These are more of my notes on the same subject, TWA telephone call and the plane number and the reservation, also made in Washington before I left.

Mr. Melchior: I would like to offer the paper now identified by the witness as Plaintiff's Exhibit 9. [137]

(Testimony of Lucy K. Cohen.)

The Court: Received in evidence.

(Notes made by plaintiff marked Plaintiff's Exhibit 9 in evidence.)

The Witness: I apologize for the state of it.

Mr. Melchior: Would your Honor like to see the exhibit?

The Court: No.

Q. (By Mr. Melchior): Mrs. Cohen, I would like to show you Plaintiff's Exhibit 8 and ask you whether there is any reference to the time of the departure of your flight from San Francisco.

Mr. Sedgwick: If your Honor please, I think the exhibit speaks for itself. She can testify as to what time she was to leave.

The Court: Yes. All you need to do, Mr. Melchior, is to tell the jury about it.

Mr. Melchior: All right. Fine.

The Court: What does it show?

Mr. Melchior: I would like the jurors to note that about three-fourths down toward the foot of the paper, which is Plaintiff's Exhibit 8, the following is shown in pencil:

"8:14, No. 36, SF-Chicago, 76 times 2, 152. 2 (in a circle)," and then it says "8:45 p.m.—5:02 p.m. (midway)."

On Plaintiff's Exhibit 9, on the reverse, there is [138] written in ink diagonally across the page "TWA St. 3-4200, San Francisco-Chicago, first-class \$114.75, No. 36-Lv SF 8/14, 8/45 a.m. Arr. Chic. 5:20 p.m."

Q. (By Mr. Melchior): Do you recall arriving

(Testimony of Lucy K. Cohen.)

at the lobby of the Maurice Hotel on the morning of August 14th, 1957? A. Yes.

Q. What time did you arrive there?

A. I think it was shortly after seven o'clock.

Q. Did you come down on the elevator?

A. Yes, sir.

Q. What did you do after you arrived in the lobby?

A. I went to the desk to pay my bill and to leave the key. I did those things.

Q. What did you do after that?

A. I went back toward the elevator to wait for my daughter, who was coming down.

Q. Did your daughter arrive?

A. Yes, she came down shortly thereafter.

Q. And at that point what happened?

A. Then we proceeded to the door. Our bags were already in the cab.

Q. What were you wearing at that time, Mrs. Cohen?

A. I was wearing a gray cotton dress, with a little jacket, a hat, no coat, and I was carrying a purse and a little cloth bag. [139]

Q. I show you a pair of lady's shoes, Mrs. Cohen, and ask you whether you can identify these shoes.

A. Yes; these are the shoes that I wore.

Q. On the morning of August 14th?

A. On the morning of August 14th, yes.

Mr. Melchior: I would like to offer the shoes identified just now as Plaintiff's Exhibit 10.

The Court: Received.

(Testimony of Lucy K. Cohen.)

(Pair of shoes were received in evidence and marked Plaintiff's Exhibit 10.)

Q. (By Mr. Melchior): Now, where did you proceed at that point?

A. I was proceeding toward the door, toward the doorway. The door was open on one side.

Mr. Melchior: Just a moment. Before I go on, may I take a moment to show the shoes to the jury, your Honor?

The Court: You can do that after while.

Mr. Melchior: All right. Fine.

The Court: Let's get the examination over with.

Q. (By Mr. Melchior): What transpired at that time? A. I beg your pardon?

Q. Withdraw the question. Who else was in the lobby at that time?

A. As I recall, I think we were the only guests at the time, because it was fairly early. There was my daughter, the manager [140] who was opening the door. A bellman was just outside the door. He had taken our bags out. The taxi man was just outside the door. There was someone at the desk. I don't recall if it was a man or a woman.

Q. Where was your daughter in relation to yourself? A. Just a few steps behind me.

Q. And then as you proceeded out the door did anything happen?

A. Yes. I felt my toe catch in something and I tried to disengage my toe; as I was walking and trying to recover my balance I found myself on the floor, on my knee, right in the doorway.

Q. Do you know on what you caught?

(Testimony of Lucy K. Cohen.)

A. Well, I didn't know it at the time, but when I fell and I was on the ground I looked back and saw that it was a rug.

Q. And where did you land as you fell to the floor?

A. Well, I landed—I don't quite understand.

Q. Where did you body first touch the floor?

A. As far as I can recall, it was on my right knee.

Q. And at what place in the lobby, Mrs. Cohen?

A. Just in the doorway.

Q. Now I will show you Plaintiff's Exhibit 3. Can you show on that exhibit where your body came to rest? Make a cross with this pencil.

A. Well, it was very close to where my daughter did. Shall I circle it? Somewhere in that area (indicating). [141]

Q. And you have initialed where you have circled it? A. Yes.

Mr. Sedgwick: What exhibit is that?

Mr. Melchior: That is Exhibit 3.

The Court: Is this a good point at which to suspend, Mr. Melchior?

Mr. Melchior: I think it will be, yes, your Honor.

The Court: Ladies and gentlemen of the jury, while you are out of the courtroom don't talk about this case, do not permit anyone to talk to you about it. We will be at recess until 10:00 o'clock a.m. January 6, 1959. [142]

(Thereupon an adjournment was taken until
10:00 o'clock a.m. Tuesday, January 6, 1959.)

DONALD MARSHALL

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

The Witness: Donald Marshall, 142 Newman Street, San Francisco.

The Clerk: Occupation?

The Witness: Process server.

The Clerk: Will you spell your last name?

The Witness: M-a-r-s-h-a-l-l.

Direct Examination

Q. (By Mr. Melchior): Mr. Marshall, you are a process server. For whom do you work? [143]

A. Attorneys Messenger Service.

Q. I show you a document, a paper stapled to it which I have shown to counsel and ask you whether you can identify it?

The Court: What is this all about?

Mr. Melchior: If your Honor please, the witness is asked to serve a party whom we wanted to call as a witness in this trial and was not able to find him and make proof of that.

The Court: What has that got to do with it?

Mr. Melchior: If your Honor please, under the Law of California if a witness is not called an inference is raised that his testimony would be contrary to the party who did not call him and we have a right to rebut that by showing that we tried to find him and we couldn't find him.

(Testimony of Donald Marshall.)

The Court: All right.

A. As far as I know this is the paper that I had for him. I don't read them, I just serve them because I have an affidavit that goes with them.

Q. Did you receive a paper which asked you to serve a subpoena on William Lohman?

A. Yes, sir.

Q. Is the paper I have given you a subpoena for Mr. Lohman and a check for his fees tendered with that?

A. As far as I know, there is a check for witness fees on it. [144]

The Court: Who is Lohman?

Mr. Melchior: Mr. Lohman was the photographer who was in the lobby of the hotel.

The Court: You are talking about California Law, we have our own procedure, hasn't anything to do with the State Law. I am not making any point of it one way or the other; if you want to put it in, why, put it in.

Mr. Melchior: All right, I will offer it.

Mr. Sedgwick: I have no objection.

The Court: Received in evidence for whatever it is worth.

Mr. Melchior: I offer the subpoena.

The Court: There isn't any presumption in this court that the testimony would be against you if you didn't call a witness. We are not operating a State Court of California, I told you that last week.

Mr. Sedgwick: I don't believe there is any such presumption in the State Court either, your Honor.

(Testimony of Donald Marshall.)

The Court: There certainly isn't here. We are wasting a lot of time.

Mr. Melchior: Did you try to serve Mr. Lohman, Mr. Marshall? A. Yes, sir.

The Court: That will be all. Step down.

Mr. Sedgwick: Your Honor please, may I ask the witness a question or two?

The Court: Oh, sure.

Cross-Examination

Q. (By Mr. Sedgwick): You say you tried to serve Mr. Lohman? A. Yes, sir.

Q. When?

A. Well, I don't remember the dates, but it was during Christmas.

Q. What? A. During Christmas time.

Q. Wait a minute, you have come here in this court to testify that you made an effort as a professional process server to find Mr. Lohman and you're unable to do so. Do I understand you correctly?

A. That is all I have, his address to go on and I have got a job I work during the day and I only can work nights.

Q. Did you ever go down to that address shown on that subpoena? A. Yes, sir.

Q. When?

A. Right after Christmas and a couple of times before Christmas, to Rollingwood—I can't remember the street that turns off.

Q. On which side of Junipero Serra is it on?

(Testimony of Donald Marshall.)

A. On the right-hand side of Rollingwood. [146]

Q. Which side of Junipero Serra was it on?

A. On the right-hand side going down.

Q. Did you talk to Mrs. Lohman?

A. No, I didn't talk to anybody, there was no answer at the door.

Q. You went once, is that it?

A. I went two or three times, I can't remember. I have about 150 of those stops at night and I can't remember how many stops I make for each of them.

The Court: You don't remember this one, do you?

The Witness: I remember the papers I do serve because of the territories I serve them in. San Bruno happens to be only one that I get three or four in a week for down there and I can't take the time when I have about 150 for Daly City and four for San Bruno to go down to San Bruno and waste an hour down there so I wait until I get enough to make it worthwhile to go down there.

Q. (By Mr. Sedgwick): You haven't been down there since before Christmas, is that your testimony?

A. I was down to San Bruno the other night.

The Court: When? Let's get specific.

The Witness: Well, that paper was turned in—I turned that paper back in the office, I think, a little over a week ago, if I am not mistaken, just before New Year's, I [147] think, I turned that paper back into the office.

(Testimony of Donald Marshall.)

Q. (By Mr. Sedgwick): Did you ever telephone him?

A. No. Like I say, I work during the daytime and when I get off—I work at Gallenkamp's during the daytime and when I get off at 6:00 and I don't get started until about 7:00 o'clock by the time I go home and eat and get going.

Q. Do you have his telephone number?

A. No, I don't.

Q. Well, let me give it to you. You can call him. He is there any time you want to call him and so is his wife. If you really wanted him you could go down and get him right now. The telephone number is Juno 3-9696. Do you want to make a note of it?

Mr. Melchior: Is counsel testifying here? I object to counsel's statement.

The Court: You started this, counsel; we are going to see it through.

Mr. Melchior: That is very well with me, but I am not going to have counsel testify. I object to it, your Honor.

The Court: The objection is overruled. He isn't testifying. All he is giving is the process server a telephone number of the witness that you say you can't produce. If not, counsel is showing how you can get him.

Mr. Melchior: There is no proof that counsel has [148] given this witness the right telephone number.

The Court: The objection is overruled, we don't tolerate that sort of argument.

(Testimony of Donald Marshall.)

Mr. Sedgwick: Juno 3-9696.

A. What is that address again, please?

Q. The address is—— A. 120?

Q. ——Birch Court, San Bruno.

A. And the name?

Q. Richard Lohman, L-o-h-m-a-n.

Mr. Sedgwick: I have no further questions, your Honor.

The Court: All right.

Mr. Melchior: That is all.

The Court: Have anything further?

Mr. Melchior: No, your Honor.

The Court: The witness is excused. All right. Step down.

(Witness excused.)

Mr. Melchior: Mrs. Cohen, please.

LUCY K. COHEN

the plaintiff herein, recalled as a witness in her own behalf, resumed the stand, being previously duly sworn, testified further as follows: [149]

Direct Examination—(Continued)

Mr. Melchior: Your Honor, I believe these shoes haven't yet been shown to the jury.

The Court: What is that?

Mr. Melchior: I would like to show the shoes to the jury at this time.

The Court: All right.

Q. (By Mr. Melchior): Mrs. Cohen, when we

(Testimony of Lucy K. Cohen.)

recessed I believe the last question was how you happened to fall. What was your answer to that?

Mr. Sedgwick: Excuse me. If your Honor please, I believe the record will speak for itself as far as her answer may have been. That's not a question.

The Court: We are not going to repeat the testimony.

Q. (By Mr. Melchior): Where did you land at the time of your fall, Mrs. Cohen?

A. Right in the doorway of the hotel on a marble slab.

Mr. Melchior: I am sorry, I see the place has already been marked and shown to the jury.

Q. Can you recall how your foot caught at the time of your fall?

A. Well, as I recall something caught my foot as I was walking and I tried to recover my balance and wasn't very [150] successful and the next thing I knew I was down in the doorway on the marble door jamb on my knee.

Mr. Sedgwick: Your Honor please, could I have that answer read?

(Record read by the reporter.)

Mr. Sedgwick: Thank you.

Q. (By Mr. Melchior): Do you know what it was that caught your foot?

A. Yes, it was the rug.

Q. Do you know what part of the rug?

A. I beg your pardon?

Q. Do you know what part of the rug?

A. It was the edge. I saw that afterwards.

(Testimony of Lucy K. Cohen.)

Q. Now, prior to that time had you ever had any slips or falls or breaks of any kind?

A. I have had, well, I imagine I must have as a child fallen, but I have had no breaks, no injuries of any sort.

Q. As an adult did you have any falls?

A. No, sir.

Q. Will you state whether or not you had any warning of any untoward condition of any kind as you proceeded through the lobby?

Mr. Sedgwick: Just a minute, if your Honor please. That most certainly, in my opinion, would be a self-serving statement and a conclusion of the witness, certainly not a factual matter. [151]

The Court: Yes. Objection sustained.

Q. (By Mr. Melchior): Did you notice anything unusual or out of the ordinary as you walked through the lobby? A. I did not.

Q. Now, will you state to what your attention was directed as you came through the lobby up to the moment of the fall?

A. As I recall I was—the taxi was waiting outside and we were going towards the taxi. The bellman was just outside the door. I hadn't tipped him yet, I think he was probably waiting for his tip. As I also recall the manager was over to one side, we had just said good-by. Other than that I don't think my attention was diverted by anything.

Mr. Melchior: I didn't hear the whole of the answer. May I have that last part?

(Record read by the reporter.)

(Testimony of Lucy K. Cohen.)

Q. (By Mr. Melchior): When you landed on the marble slab, Mrs. Cohen, did you experience any sensation?

A. Yes, it was the worst pain I think I have ever suffered in my life. It was a most excruciating pain.

Q. What was the place of the pain?

A. Well, I assume—it was largely centered in my right leg around my knee.

Q. Can you describe the nature of this pain?

A. Well, it's a difficult matter to describe it, but as I remember it was about the worst pain I have ever suffered.

Q. What did you do?

A. I just asked to be left alone.

Q. What happened thereafter?

A. One of the hotel employees, I don't—I think it was the bellman, who was at the door, picked me up under the arms and kind of half dragged me to a settee in the lobby.

Q. Can you keep your voice up a bit, please?

A. I will try. I am sorry.

Q. When you were sitting on the couch, on the settee in the lobby, did you look over toward the rug in question?

A. Yes, I did, I was very much concerned what had caused the accident.

Q. You will have to keep your voice up, please. I have a difficult time hearing you.

What did you see?

A. As I looked back over the rug I saw that

(Testimony of Lucy K. Cohen.)

it was somewhat wavy at the point where my foot caught.

Q. What point was that, madam?

A. That was at the edge of the rug—there were two rugs and this is at the edge of one between two pillars, as I recall.

Q. Now, at that point did anyone come over and speak with you? [153]

A. Well, everyone at the hotel, on the hotel staff, those were the only ones in the lobby at the time, were hovering around me, the bellman and the elevator man and the manager. There was someone at the desk but I don't think that person, I don't remember whether a man or woman, left the desk. My daughter was there going back and forth making telephone calls. I don't remember whether the taxi man ever came into the lobby. He had been outside the door.

Q. At the time did anyone say anything to you about the condition of the rug before the accident? Just answer yes or no, please. A. Yes.

Q. Do you recall who said this?

A. No, I don't recall who said it. I'm sorry. But I think it must have been one of the hotel employees, because they were the only ones there at the time.

Q. There was no one present except the hotel employees?

A. And my daughter who, I think at this point, was calling the doctor, or a doctor.

(Testimony of Lucy K. Cohen.)

Q. And this took place at what time? Immediately after the accident? A. Yes.

Q. In the lobby of the hotel?

A. In the lobby.

Q. What did this person say? [154]

Mr. Sedgwick: Just a minute, if your Honor please. I am going to object to that as hearsay, without any proper foundation made as to the identity of the person who supposedly made some admission, I take it is the purpose of the question.

Mr. Melchior: That is the purpose of the question. I respectfully submit, your Honor,—

The Court: Who was the individual now whose statement you are offering?

Mr. Melchior: The lady has testified, your Honor, that there were three employees present and no other person and she can't identify—

The Court: An employee of the concern?

Mr. Melchior: Yes, your Honor.

The Court: Better lay the foundation. Let's get the foundation.

Q. (By Mr. Melchior): Was there anyone present, Mrs. Cohen, except for the three persons you have described, the bellman and the elevator man and the manager? A. No, sir.

Q. Now, one of these three made a statement, is that correct? A. Yes, sir.

Q. Do you recall which one of them?

A. No, I don't recall which one of them, because they were [155] all hovering over me. I guess I didn't look up to see who said what.

(Testimony of Lucy K. Cohen.)

Q. Was there any other person besides those three present? A. No.

Q. Do you have any doubt about that whatever?

A. None whatsoever.

Q. Now, do you recall what this one person of those three said at that time?

Mr. Sedgwick: Same objection, your Honor, hearsay and no proper foundation laid as to the identity of the person or the fact of agency.

Mr. Melchior: I am going to submit it, your Honor, on the basis that the lady has identified the three persons present, all employees of the hotel, therefore the agency is established even though under the circumstances she did not determine which of the three actually made the statement.

The Court: The doorman, the bellman and the manager——

Mr. Melchior: The elevator man, the bellman and the manager, yes, your Honor.

The Court: The elevator man, the bellman, the manager. Well, do elevator operators have any authority to make speeches for the employer?

Mr. Melchior: Well, I don't think it is a matter of making a speech, it's a statement, going to be a statement about the condition of the premises.

The Court: I understand. Does the elevator [156] operator have any authority to—in other words, is he hired to make statements? That is what we are talking about.

Mr. Melchior: Well, in the strict sense of that question, your Honor, I think no one is ever hired

(Testimony of Lucy K. Cohen.)

to make statements, but if the statements are approximately related to the nature of the employment I think that——

The Court: That is what I am talking about. Has the statement any relation at all to his employment. He is the operator of an elevator.

Mr. Melchior: I think it is.

The Court: A manager, that is something else again. Maybe the doorman—maybe the doorman, if an accident occurred in the doorway, fell in the doorway. There are three individuals. If any one of them is not able to bind the owner of this property, why, you haven't established a foundation for your question, that is what I am coming at. I don't mean to indicate my views on it, but there is a problem involved.

Mr. Melchior: I agree with that, your Honor, and I am going to have to submit it as is.

The Court: The problem involved. Now, the law on the subject—have you looked up the law on that subject? What is the law on that subject? [157]

Mr. Melchior: I think I have an idea I can connect this up through establishing a scope of the authority of these persons.

The Court: Well, you are going to have to do that before we get that declaration before the jury.

Mr. Melchior: Well, I can't do it through this witness, your Honor.

The Court: All right.

Q. (By Mr. Melchior): Mrs. Cohen, when you stayed at the hotel, from the time you arrived until

(Testimony of Lucy K. Cohen.)

your accident, did anyone say anything to you, did anyone on the part of the hotel say anything to you about the condition of this rug? Just answer yes or not. A. No, sir.

Mr. Sedgwick: The answer was no?

The Witness: No, sir. [158]

* * * * *

Q. (By Mr. Melchior): Now, did your hospital stay interrupt any plans with respect to your employment in the East, Mrs. Cohen? A. Yes.

Q. What was the nature of those plans and the nature of the interruption. [172]

A. I was, I think I said this, I was employed by the President's Committee on Scientists and Engineers and the appointment ran until the 30th of September. At that time I had an opportunity to make a change for a permanent job, and while I was in the hospital notification of a new appointment came to me.

Q. Came where?

A. To Washington. It was just by accident——

Q. Where in Washington?

A. At my home in Washington. It was just by accident. It was just by accident someone looking after the cats noticed that there was a letter from the Civil Service Commission, thought it might be important and sent it along. When I received it the time had expired when I could accept the appointment, but——

Q. Where did you receive it?

A. In the hospital. But I telephoned the Public

(Testimony of Lucy K. Cohen.)

Health Service and spoke to the Personnel Office and then sent them a letter saying if it was not too late I was still interested in the job.

Q. Mrs. Cohen, I show you a letter and ask you whether you recognize this?

A. Yes, it is the letter that I wrote when I was in the hospital and sent to the Personnel Office of the Public Health Service in Washington. [173]

Q. Did you sign this document at the time you were in the hospital? A. Yes, I did.

Mr. Sedgwick: Your Honor please, I am going to object to this; incompetent, irrelevant and immaterial. It adds nothing to her testimony, just a recapitulation, immaterial one way or the other, but we are loading the record here with a lot of documents that, it seems to me, is unnecessary.

The Court: Hasn't her testimony covered everything?

Mr. Sedgwick: It has, your Honor.

Mr. Melchior: I would like to offer this letter, your Honor, it indicates the nature of the lady's anxieties and problems with respect to securing her employment, it was actually very dangerous for her——

The Court: A letter she wrote?

Mr. Melchior: A letter she wrote while in the hospital to her employment supervisor at the Public Health Service.

The Court: Objection sustained.

Mr. Melchior: I would like to have the document marked for identification.

(Testimony of Lucy K. Cohen.)

The Court: All right, mark it for identification.

The Clerk: Plaintiff's Exhibit 15 for identification only. [174]

(Whereupon an unidentified letter written by Mrs. Cohen to Public Health Service marked Plaintiff's Exhibit 15 for identification only.)

Q. (By Mr. Melchior): Mrs. Cohen, did you make any telephone calls as the result of your accident, long distance telephone calls?

A. Yes, I did, I called my home, I called the office, I called a lawyer in Washington who could take care of things and as a matter of fact I sent him a power of attorney so I could have some money in the bank with which to pay the hospital bills.

Q. What was the need for the power of attorney?

A. Well, I had no money in the bank and I did have a little in savings.

Mr. Sedgwick: If your Honor please, I am going to ask that last answer be stricken as not responsive, ask also for the opportunity to object to this as completely incompetent, irrelevant and immaterial, has nothing to do with this case whatsoever. A self-serving declaration.

The Court: I think you are correct, counsel. You are going into a great detail about a lot of things that seem to me to be quite tenuous here, have her lawyer go down to the bank and switch funds from one account to the other. That is what you are talking about, isn't it?

Mr. Melchior: That's not all, your Honor. I am

(Testimony of Lucy K. Cohen.)

[175] sorry, with great respect I would like to note an objection to your Honor's statement that this is a tenuous matter.

The Court: Well, you may have your objection.

Mr. Melchior: Thank you, your Honor.

The Court: And I will repeat it, I think it is quite tenuous and the objection is sustained on that ground.

Q. Mrs. Cohen, did Mr. Schifter, the attorney in Washington, render you any other services with respect to taking care of your Washington affairs as a result of your inability to be in Washington?

A. Yes, he did.

Q. Will you state the nature of the services that he rendered to you?

A. Yes, he not only took care of me, see that I had some money to pay bills with, but he also took care of arrangements for my home and my younger child and my employment.

Q. Where was your younger child at this time?

A. In New York State.

Q. Did Mr. Schifter charge you for these services?

A. Yes.

Q. How much did he charge you?

A. \$150.

Q. Now, when did you return to Washington, Mrs. Cohen?

A. On the 28th of August.

Q. Did you have additional expenses with respect to your [176] return to Washington which related directly and proximately to the accident?

Mr. Sedgwick: If your Honor please, I must object to the form of the question, relating di-

(Testimony of Lucy K. Cohen.)

rectly and proximately, that is for the jury to determine.

Mr. Melchior: All right.

The Court: Yes.

Mr. Melchior: I will withdraw it.

Q. Did you have additional expenses in connection with your return home?

A. Yes, I had to change my airplane ticket to first class fare.

Q. Why was that? Why?

A. Why, because I needed special care and space. Actually I was given two seats. I also had additional baggage because I had additional clothing that had been purchased while I was here.

Q. How much money did the additional fares and baggage on your return to Washington cost you?

A. The fares, baggage and porter came to about \$107 and some cents, I don't remember the exact amount.

Q. Were you able, at the time of your return to Washington, to move your leg freely, Mrs. Cohen?

A. No, it was in a cast, I couldn't move it at all.

Q. Would you explain how you managed locomotion at that time? [177]

A. Well, through the kindness of one of the doctors at the hospital and one of the nurses, they devised a system whereby I could sit on a board and pull the cast up with a hook made out of a coat hanger.

(Testimony of Lucy K. Cohen.)

Q. Now, Mrs. Cohen, I show you a board and ask you what that is?

A. This is the board that one of the nurses got for me so I could travel, be able to sit in a plane.

Mr. Melchior: Offer the board as plaintiff's exhibit next in order.

Mr. Sedgwick: No objection, your Honor.

The Court: Received.

The Clerk: Plaintiff's Exhibit 16 in evidence.

(Whereupon the board above referred to was marked Plaintiff's Exhibit 16 in evidence.)

Q. (By Mr. Melchior): I will show you something made from a clothes hanger, and would you state what that is?

A. Yes, that was something devised by the doctor in the hospital so I could pull the cast up.

Q. Was this what Dr. Fixler devised, then?

A. This is the hook, this is the shape.

Q. Same shape, is it?

The Court: Well, counsel, you don't need to go into such great details on this. [178]

Mr. Melchior: Very well. Offer this as plaintiff's exhibit next in order.

Mr. Sedgwick: No objection.

(Whereupon the device above mentioned was marked Plaintiff's Exhibit 16-A in evidence.)

Q. (By Mr. Melchior): Mrs. Cohen, I would like to show you and hand you plaintiff's Exhibit 16 and 16-A and ask you to show to the jury just how you used these exhibits.

The Court: Well, I am not going to permit you

(Testimony of Lucy K. Cohen.)

to make that demonstration. It's an obvious matter. We have all understood that since you made the opening statement. Proceed.

* * * * *

Q. (By Mr. Melchior): Mrs. Cohen, I show you a photograph and ask you what this is and when it was taken?

A. This was taken while I was wearing the cast and before I went back to work in Washington in my own home.

Q. What does it show?

The Court: Well, the exhibit will speak for itself when you get it in, if you do. [179]

Mr. Sedgwick: May I see it?

Mr. Melchior: Offer it as an exhibit.

Mr. Sedgwick: May I have a moment to look at it, your Honor?

The Court: Sure.

Mr. Sedgwick: May I ask the witness a question?

The Court: Yes.

Q. (By Mr. Sedgwick): Do I understand you to say this was a picture that was taken before you went back to work?

The Witness: Yes.

Mr. Sedgwick: You went back to work, I believe, on——

A. October 14.

Q. October 14? A. Yes.

Q. Who took the photograph?

A. My daughter, my younger daughter.

(Testimony of Lucy K. Cohen.)

Q. Where was it taken?

A. In my backyard.

Q. How long before you went back to work, approximately, was it taken?

A. I am sorry, would you read that?

Q. Certainly. About how long before you went back to work was that picture taken?

A. Oh, I don't recall exactly, but I would say three weeks or so before I went back to work. [180]

Q. Sometime around the middle of September, then?

A. Towards the end of September, I would say.

Mr. Melchior: Offer the photograph as plaintiff's Exhibit 17.

The Court: Received.

Mr. Sedgwick: I have no objection, your Honor.

The Clerk: Plaintiff's Exhibit 17 in evidence.

(Whereupon the photograph above referred to was marked Plaintiff's Exhibit 17 in evidence.)

Mr. Melchior: I would like to show the exhibit to the jury, if your Honor please, and I will continue my examination of the witness.

(Showing photograph to jurors.) [181]

* * * * *

Q. Mrs. Cohen, I would like you to tell the Court and jury just how this accident has affected your life or what effect it has had with respect to what you have been able to do and are no longer able to do and how it has made you [195] feel and how it has affected you in the society of persons.

(Testimony of Lucy K. Cohen.)

Mr. Sedgwick: Excuse me. If your Honor please, may I have the question reread?

The Court: Yes, read it.

(Record read by the reporter.)

Mr. Sedgwick: If your Honor please, first it is compound, it is about four questions, and I think I will object to it on that ground. Also it is a self-serving declaration, incompetent, irrelevant and immaterial.

The Court: Well, to cover the ground just ask how it has affected her life.

Mr. Melchior: All right, I will do that, your Honor.

The Court: All right.

Q. (By Mr. Melchior): Mrs. Cohen, how has the accident affected your life?

A. I will try to be as brief as I can. It just isn't the same life I had before. I am always aware of the leg. I must spend a good deal of every working day looking after it. I am no longer able to do ordinary household chores and I am no longer able to engage in the ordinary activities and exercise which were very important and maybe a necessary part of my life. I am no longer able to work as I had before, do what I did, and as a matter of fact there was an unfinished manuscript for which I may never be paid. I just am no longer [196] a member of ordinary society because I just don't have time or energy to engage in social activities. I would say my children hardly recognize me.

Q. Mrs. Cohen, I am going to show you three

(Testimony of Lucy K. Cohen.)

pictures, and ask you whether you appear in these pictures and when the pictures were taken.

A. Yes, they are pictures of me taken in 1957. This one—it has no number—throwing a ball was taken in March and the other two in either June or July of 1957 just before the accident.

Mr. Melchior: I would like to offer these three pictures identified by the witness as one exhibit next in order.

Mr. Sedgwick: To which we will object, your Honor, incompetent, irrelevant and immaterial, self-serving, having nothing to do with this case.

The Court: What is the date of these pictures, counsel?

Mr. Melchior: Mrs. Cohen testified the one throwing the ball is March of 1957 and the other two were taken in June or July of 1957.

The Court: I don't think they would serve any useful purpose. Immaterial. The objection is sustained.

Mr. Melchior: I would like to have these marked as an exhibit. [197]

The Clerk: For identification. Plaintiff's Exhibit No. 18 for identification only.

(Photographs above referred to were marked Plaintiff's Exhibit 18 for identification only.)

Mr. Melchior: Cross-examine, please.

The Court: Well, we will start cross-examination after lunch.

Mr. Sedgwick: Yes, your Honor.

(Testimony of Lucy K. Cohen.)

The Court: How many witnesses are you going to have?

Mr. Sedgwick: Your Honor, I think we will have four, perhaps five.

The Court: I take it this is your last witness?

Mr. Melchior: This is my last witness, yes, your Honor.

The Court: All right, we will be at recess until 2 o'clock, ladies and gentlemen of the jury. Don't talk about this case while you are out of the courtroom, don't permit anyone to talk to you about it.

(An adjournment was taken until 2:00 p.m. this date.) [198]

Afternoon Session—Tuesday, January 6, 1959
2:00 P.M.

Mr. Sedgwick: Proceed, your Honor?

Cross-Examination

Q. (By Mr. Sedgwick): Mrs. Cohen, just before the noon recess you had told us that you were unable to do your ordinary household chores, I believe is the term you used? A. Yes.

Q. You said you couldn't carry the washing up and down the stairs and I believe you said something else that I didn't get.

A. I am sorry, doing ordinary—taking the trash and garbage, we must take it to the basement and outside in our house.

Q. So that other than those two particular things you have mentioned, you are able to do——

(Testimony of Lucy K. Cohen.)

A. There were other things I mentioned. I don't remember all of them.

Q. I beg your pardon?

A. There were other things that I mentioned that I don't remember.

Q. What were they?

A. Things such as fixing, just putting the plug in the wall socket, I can't bend down that far, had to lay down on the floor, little things like that. [199]

Q. All right. Can you think of anything else other than what you have told us, or is that about it?

A. No, it doesn't complete it, there were many things, like working in the—we have a rather large garden, we grow our own vegetables, and so on, I can't do some of the heavy work which I had been able to do before.

Q. What heavy work do you refer to?

A. Digging, planting.

Q. Inside the house, other than the things you have told us about, you are able to get around, are you not?

A. Up to a point. If I stand, for any length of time, even doing dishes, I find my leg swells so I must stop. The same thing with cleaning.

Q. How many live in your house, what does your household consist of?

A. When my oldest daughter is at home, and my younger daughter, myself, two cats and someone who comes in and helps me now.

Q. Is your younger daughter living with you all the time?

A. Yes.

(Testimony of Lucy K. Cohen.)

Q. How old is she? A. 15 now.

Q. Your older daughter is how old?

A. She is just past 19 now. [200]

Q. She is going to school? A. Yes.

Q. Where?

A. University of Rochester, up in New York State.

Q. So that during the school terms, at least, there is yourself and your younger daughter aged 15 living in the house? A. Yes.

Q. You have full-time household help for that?

A. Yes.

Q. All right. Now, you told us something about that you had an expense of \$50 in connection with the National Symphony. What was that?

A. I have been a member of the Women's Committee of the National Symphony for about 20 years and every year I buy tickets and go to the concerts. I did the same thing this last year and couldn't use them because they are in the tiers and you had to climb up——

Q. Because they were what?

A. They were in the tiers and you had to climb up and I couldn't sit that long.

Q. Are you talking about 1958 or 1957?

A. 1957-58.

Q. How often do you go swimming?

A. Three or four times a week now.

Q. How long do you swim? [201]

A. Oh, I have a regular set procedure, a certain number of times up and down the pool, a certain

(Testimony of Lucy K. Cohen.)

number of scissor kicks, a certain number of bicycle kicks.

Q. How many times do you go up and down the pool?

A. Four times at least, depends on how much time I have.

Q. How long a pool is it?

A. Oh, I have never measured it, I don't know what the Y pool is. I am sorry. It is a good-sized pool.

Q. You do that, you say, four to five times a week?

A. Three or four times a week.

Q. What is this bicycle riding that you do?

A. I have a stationary bicycle at home for the muscles.

Q. You do that at home?

A. Yes.

Q. How much time do you put on that a day?

A. Usually in the evening, I don't have time to do it in the morning when I wake up.

Q. How long do you do it?

A. The whole series of exercises takes about an hour.

Q. You said you earned about a thousand dollars a year editing something. What was that?

A. Well, over the years I have done editing for the National Bureau of Economic Research and I edited my father-in-law's papers.

Q. Your what? [202]

A. My father-in-law's papers for a publisher, for which I was paid, and I am in the process of

(Testimony of Lucy K. Cohen.)

editing now, but I haven't been able to do much in the last year, for the Yale Press.

Q. Do you have with you any evidence of payment of these bills or the thousand dollars a year for editing?

A. No, but I could supply them if you need them.

Q. Do you have any copies of income tax returns, anything of that kind that would show that income?

A. Not with me, sir, but it has appeared.

Q. The reason you don't do that now is because you don't have the energy to do it, am I correct?

A. Yes, sir. My papers, as a matter of fact, are in the Library of Congress and they were left there just before I took this trip. I was given a cubicle to work in and all the papers are still there, I hope.

Q. You told us that you had incurred an expense of, I believe it was \$150 in attorney's fees in Washington?

A. Yes, sir.

Q. While you were out here. What was the name of that lawyer, Schifter?

A. Yes, Richard Schifter.

Q. Your husband was a lawyer, was he not?

A. Yes, sir.

Q. And Mr. Schifter was a partner of your husband's? [203]

A. No, he was not. He worked in my husband's office. I don't know what the relationship was.

Q. Well, he works in your husband's office, and is still in that office?

(Testimony of Lucy K. Cohen.)

A. Well, it is no longer my husband's office, he is dead.

Q. Your husband's name is still on the letter-head, isn't it?

A. I think it is, with the date of his death.

Q. Still on the name? A. Yes.

Q. And it was one of the attorneys in that office that charged you \$150 for helping you out while you were out here? A. Yes.

Q. Is that right?

A. On my insistence, because he did go to a lot of trouble.

Q. Now, you told us that you lost 34 working days while on this temporary job for some commission. What was the name of that commission?

A. The President's Commission on Scientists and Engineers.

Q. Was any of that 35 days or 34 working days that you told us about at \$35 a day taken care of by any sick leave? A. No, sir.

Q. How about the time that you go to the—you told us that you lost 5 hours a week since this accident on an average. [204] Has any of that been taken care of by sick leave or by vacation?

A. As I say, it comes out of my sick leave and annual leave because I must do it during the working day.

Q. Then you actually were not docked this \$1600?

A. No, but if I have any illness of any kind—

Q. But my point is that is not anything that

(Testimony of Lucy K. Cohen.)

you paid and you were not docked that, were you?

A. Well, I was on leave without pay for two weeks at the beginning of it.

Q. That's before you started the job?

A. Well, I was on the payroll, but it was on leave without pay.

Q. That's the 10 days that you told us about for which you have down \$350, isn't that correct?

A. Yes, sir.

Q. Now, I am talking about this next item, \$1600, that you told us about which represents time lost for going to the physiotherapist.

A. Yes.

Q. You actually didn't lose that money, that came out of your sick pay?

A. Well, some of it came out of my sick pay, some came out of my annual leave, some of it came out of leave without pay if I had no annual leave, sir.

Q. Now, going back to the facts of the accident, [205] Mrs. Cohen, did you call for the taxicab yourself or did you ask the hotel operator to do it for you?

A. I believe we asked the hotel operator to do it.

Q. Did it come right away?

A. I assume so. I don't know. I don't remember whether it came right away; I assume it did.

Q. Did you remain in the lobby from the time the operator called for the taxicab until it arrived?

A. No, I believe they called the taxi, I think,

(Testimony of Lucy K. Cohen.)

at the time were were upstairs, I am not sure. I think they called it before we went downstairs.

Q. Didn't you come downstairs and have a discussion with the clerk as to how to get to the airport and the time it took and that sort of thing?

A. No, sir, because in the first place I always go by cab to airports, I don't use the limousine, at least in Washington.

Q. I'm sorry.

A. I say, when I go to an airport I always use a taxi rather than a limousine in Washington, because they go by a circuitous route. Secondly, I didn't know how far it was to the airport because I don't know—I didn't at least then know San Francisco very well.

Q. How did you arrive in San Francisco?

A. By bus from Sacramento. [206]

Q. You have never been to the San Francisco Airport before?

A. Well, in 1950 we came by air from Portland, but I don't remember whether it was to this particular airport or another. I think at that time there was some difficulty on weather, so I don't remember. That was 1950 and was the last time I had come in.

Q. Isn't it a fact that you came down and talked to the clerk at the desk in the hotel about how to get to the airport, how long it takes and that sort of thing?

A. I don't remember that I discussed how long

(Testimony of Lucy K. Cohen.)

it took, because I assume the hotel would take care of its guests.

Q. I am sorry. I didn't hear your answer.

A. I say I don't recall that I discussed how long it would take because I left it with the hotel to take care of such matters.

Q. You left it to the hotel to take care of what matters?

A. The matter of calling the taxi and allowing enough time, and such things.

Q. Did you tell someone at the hotel what time your plane left?

A. Well, I assume they knew what time the plane left and asked to call at a certain time, which they did.

Q. You assumed that they knew what time your plane left?

A. I asked them to call us in time for us to make the [207] plane for which we had reservations.

Q. I am not sure I understand you. You left a call before you went to bed the night before?

A. I don't—yes. I think we must have, because we knew what plane we were leaving on.

Q. Who knew what plane you were going to take? A. My daughter and I.

Q. Did you tell anybody there the time your plane was leaving?

A. I may have told them the night before when we made arrangements to be called the next day. I don't recall doing that in the morning as I was about to leave.

(Testimony of Lucy K. Cohen.)

Q. In other words, you left it up to the hotel people to get you up at the right time and get your taxi there?

A. We arranged for it some time ago, I don't recall now whether it was 7 or 6:30. I don't remember.

Q. Who did you arrange for it with?

A. Whoever was on the switchboard at the time, I don't know.

Q. Did you do that the night before?

A. The night before.

Q. The night before? A. Yes.

Q. I see. So that if I understand your testimony, then, you arranged with someone at the desk the night before? A. Yes. [208]

Q. You were to leave to awaken you in time to reach the airport in time to take your plane?

A. Yes.

Q. Is that right? A. I believe so.

Q. And you don't remember telling them what time the plane left?

A. I don't remember, but I'm sure I must have.

Q. You don't remember having a discussion with the hotel clerk when you came downstairs that morning as to questioning him as to what time you must allow to get to the airport? A. No, sir.

Q. That sort of thing? A. No.

Q. And you ordered a taxicab to go to the airport, then? A. They ordered it for me.

Q. But you intended to take the cab directly to

(Testimony of Lucy K. Cohen.)

the airport and not down to the bus or the limousine? A. Yes, that's right.

Q. And it's your statement you always take taxis to airports?

A. We do in Washington, because it's just more expensive and it's circuitous.

Q. Well, how about at the other places you go?

A. I don't travel around much by airplane. [209]

Q. Well, you say you always do it in Washington. Where do you go from Washington?

A. If I do go to New York to visit my parents, I usually take a taxi.

Q. Now, you said that you spoke to the manager before you left. Do you recall that?

A. I don't understand your question. At what point do you mean?

Q. Before you started out to go to the taxicab did you talk to the manager of the hotel?

A. I assume we said goodbye at the desk after I paid my bill. He did speak with me later, too, after the accident.

Q. Now, you know the manager's name is Mr. Hoffer, don't you? A. Yes.

Q. And you knew him there at that time when you were at the hotel?

A. Well, I knew him in the sense that I have met him the night before and that morning, but I didn't know him otherwise, except by a letter of introduction.

Q. You had a letter of introduction to him, didn't you?

(Testimony of Lucy K. Cohen.)

A. Yes, I have it here, that is, the letter came through the mail.

Q. And so you talked to him the night before the accident [210] and you talked to him in the morning before the accident, is that your testimony?

A. I assume I talked to him the night before. I don't recall he was in the lobby when we arrived.

Q. You talked to him in the lobby, didn't you?

A. Yes.

Q. I am asking you now for your testimony on your recollection of these matters. Perhaps we can refresh your memory a bit, Mrs. Cohen. May I refer to the original deposition, if your Honor please?

The Court: Yes.

Q. (By Mr. Sedgwick): May I ask you, Mrs. Cohen, unless counsel will stipulate these questions were asked and answered—I am referring to page 14, line 10.

Mr. Melchior: We will stipulate.

Mr. Sedgwick: Thank you. Referring, then, if your Honor please, to the deposition of Mrs. Lucy Cohen taken in Washington, D. C. on June 17, 1958 at 1625 K Street, N.W., Washington, D. C., at 4 o'clock p.m. you were there with your attorney, your Washington attorney?

The Witness: Yes.

Q. (By Mr. Sedgwick): Mr. Schifter that you have mentioned? A. Yes.

Q. You were sworn to tell the truth, just as you

(Testimony of Lucy K. Cohen.)

were here, [211] you were questioned regarding the facts and circumstances of this accident?

A. Yes.

Mr. Sedgwick: I read, then, if your Honor please, page 14, line 10 to line 25.

"Q. And was it while you were there that your daughter came down?

"A. Now that I think, I had already paid the bill and the bags were down in the taxi and we wanted to say our proper farewells to the manager.

"Q. Did you say farewell to the manager?

"A. Yes. You see, the hotel had been rather highly recommended by someone who had used it for 25 years, and I think he took a special interest in us. That was all.

"Q. Did you know him?

"A. No, except that I received a letter from him confirming the reservation.

"Q. You don't by any chance recall his name?

"A. Yes, Mr. Hoffer as I recall.

"Q. Did you speak with him just before you left?

"A. Yes.

"Q. Was he there in the lobby?

"A. Yes, he was there."

Q. Does that refresh your memory? [212]

A. I said he was in the lobby.

Q. That wasn't the man that you paid, that was the clerk?

A. Whoever was behind the clerk is the person I paid the bill to.

Q. Yes. So after you paid your respects to Mr.

(Testimony of Lucy K. Cohen.)

Hoffer, as you state there, is it your testimony that is when you started out to go to the taxicab?

A. No.

Q. What did you do after that?

A. As I recall I came back near the elevator and waited for my daughter to come down.

Q. Where was Mr. Hoffer in the lobby when you talked to him?

A. I believe he was over near the desk.

Q. Over near the desk?

A. Which is on the left side as you walk out.

Q. All right, how long after you said goodbye to Mr. Hoffer was it that you started out?

A. When my daughter came down, I don't know, five minutes, whatever it was.

Q. As you started out the lobby of the hotel you were heading towards the glass doors at the front entrance, were you not?

A. Yes.

Q. Were you looking down watching where you were going? [213]

A. Yes. I wasn't looking at my feet, but I was looking ahead as one usually does when one walks.

Q. Were you looking ahead of you a matter of a few feet ahead as you were walking?

A. I assume so.

Q. I beg your pardon?

A. I assume I was looking ahead of me.

Q. All right. Well, did you notice as you were walking toward the door, you approached this rug, which is shown in Plaintiff's Exhibit No. 2 and Plaintiff's Exhibit 1, did you notice the carpeting

(Testimony of Lucy K. Cohen.)

in the condition that is shown on these photographs?

A. I noticed that there was a space between the carpets when I started from about here. When I started to walk I was about over here (indicating).

Q. Would you mind taking your finger and pointing to that spot?

A. I was standing somewhere along in here waiting for my daughter to come. The elevator is over here on this side (indicating).

Q. Well, my question is, you had started to walk towards that carpet?

A. Only after she came down.

Q. After she came down you started toward the carpet? A. Yes, towards the door. [214]

Q. Towards the door and across the carpet?

A. Yes, towards the edge of the carpeting.

Q. Well, on Plaintiff's Exhibit 2, you have made a mark, an X mark as to where you think your foot caught have you not? A. Yes.

Q. So then you did go towards this carpet where you testified that you fell?

A. I said that, sir.

Q. All right. Now, did you, as you approached the carpet, see or notice it in a condition as shown in these exhibits, Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2?

A. I didn't see it in just that form because I wasn't looking there, I was looking ahead.

The Court: You will have to lift your voice. I couldn't hear what you said and I know those jurors can't.

(Testimony of Lucy K. Cohen.)

Mr. Sedgwick: May we have the answer read?

(Record read by the reporter.)

Q. (By Mr. Sedgwick): Regardless of where you were looking you never did at any time before your fall notice that carpet in the condition that is shown in the photographs which are Plaintiff's Exhibit 1 and 2, did you?

A. That's right, sir.

Q. All right. As a matter of fact, Mrs. Cohen, you were concerned about that carpet, weren't you? You wanted it straightened out because your daughter was walking behind you [215] and you were concerned for her safety. Isn't that true?

A. It was after I fell that I noticed that.

Q. May I refer, if your Honor please, to the deposition of Mrs. Cohen on page 18, lines 7 to 13.

"Q. I believe you stated that the fact that the rug was loose—you could not see it before you fell?

"A. I was quite concerned about it, I remember. I wanted them to straighten it out because my daughter was right behind me.

"Q. Your daughter was right behind you?

"A. Yes."

Q. You did give that testimony, did you not?

A. I believe that was corrected; it was one of the corrections that wasn't accepted, I think, I am not sure.

Q. You think it was corrected?

A. I think so, but I am not sure.

Q. You have made some 50 corrections on the deposition.

(Testimony of Lucy K. Cohen.)

Mr. Melchior: I will stipulate that it was not corrected, if that is helpful, counsel.

Mr. Sedgwick: Well, it wasn't corrected. If you stipulate to it we won't have to take any more time.

The Court: That was her testimony, was it?

Mr. Melchior: That was her testimony.

The Court: And it is not corrected?

Mr. Melchior: Not corrected. [216]

Mr. Sedgwick: It is not corrected.

Q. Now, did the manager see you fall, Mr. Hoffer? A. Yes.

Q. It is a fact, is it not, Mrs. Cohen, that as you walked across the lobby that morning, you noticed nothing unusual about the rugs or anything else? A. That's true.

Mr. Sedgwick: I think that is all, your Honor. Oh, one more question.

Q. You will recall at the time of the taking of your deposition you were shown a photograph of the lobby of the hotel? A. Yes.

Q. You recall that? A. Yes, sir.

Q. And you were asked to mark that photograph with an X in the position that you fell? Do you remember that?

A. I did the best I could, because I didn't know when that photograph was taken and so on, but I don't see my initials here, sir. I don't know this is the one that I did or had my initials here. I think I noticed the one I marked.

Q. Isn't it your testimony you do not recall marking that photograph?

(Testimony of Lucy K. Cohen.)

A. I did mark a photograph at the time the deposition was taken, but I don't know whether this is the same one, because it is not initialed. [217]

Q. Well, does it show the place that you fell?

A. No, it shows the direction in which I was walking, sir. It doesn't show where I fell.

Mr. Sedgwick: Referring again to the deposition, if your Honor please, commencing on page 20, line 20, continuing to page 21, line 19.

Mr. Melchior: I will be happy to stipulate those questions were asked and answered, and they were not corrected.

Mr. Sedgwick: Thank you.

“Mr. Channing: I would like to have this photograph marked as Defendant's Exhibit No. 1 for identification for the purpose of the plaintiff's deposition.

(Black and white photograph was marked Defendant's Exhibit No. 1 for identification.)

“Mr. Channing: Q. Mrs. Cohen, I want to show you this photograph which has been marked and ask you if you can tell me what that is.

“A. Well, from my one night stay at the Hotel Maurice I would say it was a part of the lobby.

“Q. Does that photograph show where you fell?

“A. No. There are no 'X' marks the spot so far as I can see.

“Q. That is what I mean. Is there a place in that photograph that you can place an X and show us where you fell? [218]

(Testimony of Lucy K. Cohen.)

“A. Yes, it is right about here, somewhere around here.

“Q. I wonder if you would mark it with this fountain pen?

“A. Yes, somewhere in here. This is the side of the door that was open.

“Q. With the same fountain pen will you show me in which direction you were going by making an arrow? “A. Yes.”

Mr. Melchior: Do you have the photograph, counsel?

Mr. Sedgwick: I am going to offer it in evidence at this very moment and ask the Court's permission if I may remove the photograph which is marked Defendant's Exhibit 1 for identification and attached to the original deposition of Lucy K. Cohen.

The Court: Any objection?

Mr. Melchior: May I take a look at it, if your Honor please?

The Court: Certainly.

Mr. Melchior: No, I have no objection.

The Court: Received in evidence.

The Clerk: Defendant's Exhibit B in evidence.

(Whereupon the photograph above referred to was marked Defendant's Exhibit B in evidence.) [219]

Mr. Sedgwick: May I at this time show it to the jury, your Honor?

(Handing exhibit to the jurors.)

Mr. Sedgwick: I have no further questions, your Honor.

(Testimony of Lucy K. Cohen.)

Redirect Examination

Q. (By Mr. Melchior): How large is your home, Mrs. Cohen?

A. It is a 6-room brick house with a basement as well.

Q. Is that therapy about which you have testified prescribed by a physician? A. Yes, sir.

Q. All of it? A. All of it.

Q. And on the picture which is now in the hands of the jury, there is a circle. Do you know how that circle came to be in the picture? Is that the X that you made?

A. I don't recall that is the X, that is the place where the rug was ruffled, the arrow was the direction in which I was going, there is no mark there on the door jamb where I fell, whether that was marked on it, on the photograph I was shown, I don't know.

Q. The arrow is where you started—the direction you were going? [220]

A. The direction which I was going.

Q. And the circle is where you started to fall?

A. No, where I must have caught my foot, at the edge of the rug.

Mr. Melchior: That's all.

Mr. Sedgwick: I have nothing further, your Honor.

Mr. Melchior: Step down, please, Mrs. Cohen.

(Witness excused.)

Mr. Melchior: I would like to ask the Court at this time to take judicial notice of the United States Life Expectancy Table of the United States Census, 1949-1951 for white female persons aged 51, which is the age of the plaintiff, Mrs. Cohen; Mr. Sedgwick and I have stipulated this is the correct table and her life expectancy, according to this table, is 25.91 years.

The Court: Stipulated to that?

Mr. Sedgwick: I have no information about it at all. If counsel says this is what the table says, I certainly am not going to question it.

The Court: What document did you get this out of?

Mr. Melchior: This is a compilation of life expectancy tables, your Honor, and the particular table from which I am reading is——

The Court: Who makes the compilation? [221]

Mr. Melchior: The compilation is made by Nelson & Ward, Consulting Actuaries, a compilation of all published tables. There are about 22 tables in the book.

The Court: I don't know anything about that book, usually the table we receive in evidence here, the table for which counsel is requested to stipulate is found in the statute books.

Mr. Sedgwick: That's right. It's in the corpus juris.

Mr. Melchior: Corpus juris?

The Court: I don't know anything about the corpus juris. This is usually in the statutes, that is, it is published there. You know, the legislature

doesn't adopt anything, it is one of the things published in the statute book and given authenticity to that extent. This is a private compilation.

Mr. Sedgwick: That is right.

Mr. Melchior: I showed it to counsel some days ago, and counsel agreed that this table——

Mr. Sedgwick: If that is the same, if that's that table, I have no objection to it.

Mr. Melchior: This is the same table.

The Court: Instead of offering the table, why don't you—Mrs. Cohen is what, 51 years old?

Mr. Melchior: That is correct. [222]

The Court: All right. Now what is the life expectancy in accordance with that table for one 51 years old?

Mr. Melchior: 25.91 years.

The Court: May we have a stipulation to that?

Mr. Sedgwick: Yes, sir.

The Court: All right.

Mr. Melchior: Thank you very much.

I am sorry, your Honor, I did not understand perfectly the ruling of the Court this morning with respect to the computation of damages. Did your Honor rule that I could submit a schedule or that I could argue from the schedule?

The Court: We don't let you send any schedules in with the jury, but what you can do, if you are worried about the jury not being able to remember what you tell them, why we will give the jurors a piece of paper and pencil, each one of them, and they can make some notes.

Mr. Melchior: I would appreciate it.

The Court: I don't allow this blackboard business, any schedules to be sent in to the jury. They can't remember what you put on the blackboard and they can't remember what you tell them, either, in your closing argument, but I allow the jury to have a piece of—a pad of paper and a pencil and they can make whatever notes they want to during both your arguments.

Mr. Melchior: That is agreeable to me, your Honor. [223] Plaintiff rests at this time.

The Court: The plaintiff rests. All right.

Mr. Sedgwick: Call Mr. Walsh, please.

JOHN RAYMOND WALSH

called as a witness on behalf of the defendant, sworn.

The Clerk: Please state your name, your address, your office address, your occupation to the Court and to the jury.

The Witness: John Raymond Walsh, 7870 Sterling Drive, Oakland, California.

Direct Examination

Q. (By Mr. Sedgwick): Your occupation?

A. Legal photographer.

Q. Mr. Walsh, you are employed as a photographer by the Bay Cities Legal Service?

A. I am one of the owners of Bay Cities Legal Service.

Q. I beg your pardon, sir. In pursuit of that occupation, at the request of the defendants here,

(Testimony of John Raymond Walsh.)

did you take some photographs of the lobby of the Maurice Hotel in San Francisco? A. I did.

Q. Can you tell us what date they were taken?

A. I believe it was December 16, 1957.

The Court: What was the date of the accident?

Mr. Sedgwick: August 14, 1957, your Honor.

Q. I show you first a photograph and ask [224] you if that is a fair representation of the condition of the portion of the lobby of the Maurice Hotel?

A. That is.

Q. Can you tell us in what direction that photograph was taken?

A. This was taken from in front of the elevators looking north towards the doorway leading to Post Street.

Mr. Sedgwick: May I offer this photograph as Defendant's Exhibit next in order, if your Honor please.

The Court: Received in evidence.

The Clerk: Defendant's Exhibit C in evidence.

(Whereupon the photograph above described was received in evidence as Defendant's Exhibit C.)

Q. (By Mr. Sedgwick): I show you another photograph and ask you to tell us what portion of the lobby of the Maurice Hotel that shows, if any?

A. This is a detail of the area between the two rugs. This is still looking north, taken from in front of the elevator moving more towards the front door.

(Testimony of John Raymond Walsh.)

Mr. Sedgwick: I will offer this as Defendant's Exhibit next in order, your Honor.

Mr. Melchior: No objection.

The Court: Received in evidence.

The Clerk: Defendant's Exhibit D in evidence.

(Whereupon the photograph above referred to was received in evidence as Defendant's Exhibit D.) [225]

Q. (By Mr. Sedgwick): I show you another photograph any ask you to tell us what that shows.

A. This shows the lobby of the Maurice Hotel looking east from the west side of the lobby, which would be towards the desk side, showing the front door and the space between the pillars.

Mr. Sedgwick: Offer it as Defendant's Exhibit next in order.

Mr. Melchior: No objection.

The Court: Received in evidence.

The Clerk: Defendant's Exhibit E in evidence.

(Whereupon the photograph above referred to was received in evidence as Defendant's Exhibit E.)

Q. (By Mr. Sedgwick): Mr. Walsh, when you took those photographs—first, did you make any changes in the rugs yourself?

A. No, sir, I did not.

Q. Did anyone else make any changes to the rugs so far as you know?

A. Not to my knowledge, no.

Q. Did you go in, set up your camera, and take

(Testimony of John Raymond Walsh.)

your photographs of the conditions as it then existed without change, so far as you know? [226]

A. That is correct.

Mr. Sedgwick: I have nothing further, your Honor.

The Court: Cross-examination?

Mr. Sedgwick: While he is doing that, may I show the photographs to the jury?

The Court: Surely.

Cross-Examination

Q. (By Mr. Melchior): Mr. Walsh, I think you took those pictures on December 16, 1957, you said?

A. That is correct.

Q. Have you any knowledge as to the condition of the things shown in those photographs on August 14, 1957?

A. No, sir, I have not.

Q. You don't know anything at all about how it looked that morning, do you?

A. No, sir.

Q. Now, did anyone have any discussion with you at all about the kind of photographs you were supposed to take?

A. They told me somebody had fallen in a certain area and they wanted photographs to show that.

Q. Who is "they"?

A. The manager of the hotel, I believe. I forgot his name. I didn't mark it down.

(Testimony of John Raymond Walsh.)

Q. Did he tell you what kind of pictures he wanted? [227]

A. No. I have been building up a reputation as a legal photographer over a period of approximately 15 years and people rely on my knowledge and ability to take a photograph that will stand up in Court and show what they want to show.

Q. Show what?

A. Show what they want to show, the area in question as it is.

Q. Did anyone meet you while you were in the lobby and have a discussion with you about the kind of photographs that were to be taken?

A. There was a Mr. Goldman, I believe, there.

Q. Who?

A. He was a representative of Mr. — Keith, Creede & Sedgwick's office.

Q. Did he tell you what photographs were wanted?

A. He said he wanted a view looking this way, a view looking that way and a detail.

Q. Did he assist you in setting up your camera for angles and anything of the kind?

A. No, he didn't. He was talking to the manager at the time I was doing my photographic work.

Mr. Melchior: That's all.

Mr. Sedgwick: Thank you, Mr. Walsh.

(Witness excused.)

Mr. Sedgwick: Mr. Carter. [228]

RICHARD S. CARTER

called as a witness on behalf of the defendants, sworn.

The Clerk: Please state your name, your address, your office address will do, and your occupation to the Court and to the Jury.

The Witness: Richard S. Carter, 872 Sutter Street. I am a bellman at the Maurice Hotel.

Direct Examination

Q. (By Mr. Sedgwick): Mr. Carter, what is your present occupation, sir?

A. I am a bellman at the Maurice Hotel.

Q. For how long have you been a bellman at the Maurice Hotel?

A. About 7 years.

Q. Were you on duty on the morning that Mrs. Cohen fell in the lobby?

A. Yes, sir.

Q. That we have been talking about here for several days? Can you tell us about where you were at the time she fell?

A. Well, I was outside the hotel.

Q. And what were you doing outside, sir?

A. I had just put some bags into a taxi.

Q. Do you know whose bags those were?

A. I don't remember.

Q. Did you come back into the hotel? [229]

A. Yes, sir.

Q. What did you notice, if anything, as you entered the hotel?

A. As I came back in through the door, I noticed Mrs. Cohen on her knees on the carpet.

(Testimony of Richard S. Carter.)

Q. About how close to the front door would you say she was? A. Well——

Q. Just your best estimate?

A. I would say from a foot and a half to three feet from the door.

Q. Did you do anything at that time, did you go up to her? A. Yes.

Q. You recall anything that was said?

A. Well, I tried to pick her up, "You want me to help you up?" She said, "No, let me alone," as I remember it.

Q. All right. Did you later help her up?

A. Yes, sir.

Q. Where did you help her to?

A. Around to a settee in front of the desk.

Q. Did you notice Mrs. Cohen's daughter there at the time?

A. No, I didn't. She may have been there, but I didn't notice her.

Q. Now, let me ask you this question, Mr. Carter: Did you [230] at any time that morning say to Miss Cohen, Mrs. Cohen's daughter, the young lady whose first name is Gene, Miss Gene Cohen, did you at any time say to her in anybody's presence or alone, anything substantially to the effect that, "I make a point of watching this rug"?

A. No.

Mr. Melchior: I object. I think counsel asked a compound question, did he at any time that morning or did he at any time say anything to Miss Gene Cohen.

(Testimony of Richard S. Carter.)

The Court: The objection is overruled. Read the question to the witness.

(Record read.)

The Witness: No, sir.

Q. (By Mr. Sedgwick): Confining your attention to this morning of the accident, and so we will not misunderstand each other, not referring to the next day when the people came back and took photographs, but confining ourselves now to the morning of the accident, was there any discussion by you with Mrs. Cohen or Miss Cohen or anyone else there regarding the rug?

A. None whatsoever.

Q. Now, did you take Mrs. Cohen upstairs?

A. Yes, sir.

Q. How did that come about?

A. Well, she sat on the settee for a little while to recover her equilibrium, and I believe Mr. Hoffer, the manager, [231] suggested that we take her upstairs, back in the room from which she checked out of. I helped her into the elevator and when we got up there I carried her to the room.

Q. Did you do this against her will at all?

A. No. In the elevator she said, "Let me alone, I can stand all right." I said, "I better hold you," I had her in my arms, "I better hold you until you get to the room."

She didn't object after that.

Q. Now, do you remember the following day, Mr. Carter, that this same Miss Gene Cohen came back to the hotel accompanied by Mr. Melchior

(Testimony of Richard S. Carter.)

here, the attorney, and a photographer? Do you remember that?

A. I don't remember Miss Cohen or this gentleman here, but I remember that a photographer and somebody with him took some pictures, but I wouldn't know it was the next day or when it was.

Q. Was it shortly after this accident?

A. It must have been.

Q. Within a matter of days?

A. I would judge so. My memory is very faulty about that. We were very busy; it was in August and any small event like somebody taking pictures, which they sometimes did in the lobby, wouldn't have attracted much attention on my part.

Q. You recall somebody came in?

A. Yes, sir. [232]

Q. Accompanied by some other people and took some photographs? A. I do.

Q. At that time did you have any conversation with these people that were there to take these photographs?

A. Somebody engaged me in conversation.

Q. Now, during that conversation did you make any statement to the effect, or substantially to the effect that "I make a point of watching this rug"?

A. No, sir.

Q. Did you make a statement to the effect or substantially to the effect that this happens all the time? A. Oh, no.

Q. Did you make a statement substantially to the effect that this is a dangerous condition?

(Testimony of Richard S. Carter.)

A. No, sir.

Q. Did you make a statement that this happens regularly?

A. No, I wouldn't have made a statement like that.

Q. You say you wouldn't have made any statement like that? A. I would not have, no.

Q. Can you tell the Court and jury why you wouldn't have made any such statement?

A. Well, because it wouldn't be true. I wouldn't have any purpose of telling an untruth about that.

Q. You have been there, you said, seven years?

A. Sir? [233]

Q. You have been there seven years?

A. Approximately, I believe a little better than that.

Q. Have you ever seen anyone or known of anyone falling in the lobby before? A. No.

Q. I will show two photographs—three photographs, Plaintiff's 1, 2 and 4. These are photographs looking towards the doorway showing the rug in question. Would you look at those, please? Just look at them, sir. A. Yes, sir.

Q. Have you ever seen the rugs, the rug we are talking about here in this case, the one closest to the door, have you ever seen it in that condition at any time?

A. I have never seen it ruffled up like it is there.

Q. Occasionally during the years that you have

(Testimony of Richard S. Carter.)

been there does the rug become mussed somewhat?

A. Once in a while.

Q. Do you do anything about it if you notice it?

A. Whenever I notice it I smooth it down.

Q. About how many times would you say during that——

A. Well, very, very seldom. I haven't—I don't think I have smoothed it down at the present time for a couple of years. [234]

Q. Were you in the habit of keeping your eye on that rug? A. No reason for it.

Q. Did you pay any particular attention to that rug?

A. No, not either one of the rugs. There are two in the lobby, as you know.

Q. The two are about the same, are they not?

A. Yes, sir.

Q. What time did this accident occur to Mrs. Cohen in the morning of August 14?

A. Well, it was about 7:30 or 7:40, as I remember.

Q. Between 7:30 and 7:40?

A. Somewheres around there.

Mr. Sedgwick: I think that is all, your Honor.

Cross-Examination

Q. (By Mr. Melchior): When did you first see Mrs. Cohen on that morning, Mr. Carter?

A. The first time I noticed her to remember was when I picked her up. Undoubtedly I must have seen her before that, but I don't remember.

(Testimony of Richard S. Carter.)

Q. There isn't any question in your mind, is there, that she was injured that morning in the lobby there?

A. That was the time of the accident in the morning.

Q. There is no question about it at all that that was [235] how she was injured in the lobby by falling?

A. I don't know as I understand your question.

Q. Was she injured by falling in the lobby, or had her condition existed prior to that?

A. Oh, no. I understand. She evidently fell in the lobby because I picked her up from it.

Q. Actually your memory about what else happened in August of last year—I guess it is two years now—August, 1957, isn't very good, is that right.

A. That is correct. I remember the accident because it was something outstanding and unusual, but a routine affair I wouldn't remember very much about it.

Q. Such as the event of having the pictures taken you say you don't remember very much about it?

A. Very little.

Q. Do you recall exactly what it was that you said in conversation at the time the pictures were taken?

A. Not precisely. That was nine months ago, I believe.

Q. Actually until you prepared yourself to tes-

(Testimony of Richard S. Carter.)

tify for this trial you couldn't remember that the pictures were taken at all, could you?

A. I remember two different photographers at two different times taking pictures, but what took place or what was said I don't remember.

Q. You got those two different events of taking the [236] pictures clearly separated in your mind, have you, so that you remember which was one and which was the other?

A. No, I wouldn't say that I had. I remember that someone from each party engaged me in conversation, but what was said each time I couldn't tell you.

Q. Now, do you recall ever saying in the presence of Miss Gene Cohen and Mr. Lohman and myself that whenever you saw the carpet up your smoothed it down?

A. No, I don't recall saying that now. I might have recalled at the time of the deposition, but at the present time I can't recall that, sir.

Q. Do you recall saying you smoothed the carpet down only when somebody's heel catches on it?

A. I didn't.

Q. You recall testifying in a deposition?

A. I do.

Q. In my office? A. Yes, sir.

Q. And that was on March 25, 1958.

A. I wouldn't remember the exact date.

Q. Do you recall saying at that time that you smoothed the rug down only when someone's heel catches on it?

(Testimony of Richard S. Carter.)

Mr. Sedgwick: Excuse me, I am going to object to the form of the question. I don't believe that is the proper way to approach the deposition, we have a page and a number. [237]

The Court: Yes.

Mr. Sedgwick: And get the exact words.

Mr. Melchior: Page 8, line 24.

"Q. Do you recall saying"——

Mr. Sedgwick: Excuse me.

Mr. Melchior: Let's start at page 8, line 16.

Mr. Sedgwick: How far do you propose to read?

Mr. Melchior: I propose to read to page 9, line 10.

Mr. Sedgwick: I have no objection, your Honor, I will stipulate that the questions were asked and the answers given as shown.

Mr. Melchior: Page 8, line 16.

"Q. What do you remember?

"A. I remember saying to someone and no doubt it was you if you remember me and remember the occurrence, that whenever I saw the occurrence, that whenever I saw the carpet up I smoothed it down, but I didn't, distinctly don't remember saying regularly, because I don't know why I would be because it doesn't regularly go up.

"Q. Pretty regularly, my notes have.

"A. Well, I can't remember saying that, no.

"Q. Do you recall saying that you do this only when someone's heel catches on it? [238]

"A. I don't recall saying that, but quite likely could have.

"Q. That is true as a matter of fact, is it?

(Testimony of Richard S. Carter.)

“A. Well, I would say that if the heel caught on it, a man’s heel caught on it, I have never seen a woman’s heel catch on it, but if a man pulled it up I would smooth it down.

“Q. How many times have you seen that, that people’s heels catch on it?

“A. I couldn’t tell you; very seldom, very seldom.

“Q. You have seen it before?

“A. I have seen a man catch his heel on there, but actually the number of times I couldn’t tell you. It would be very few.”

You recall that testimony, Mr. Carter?

A. Yes, sir.

Q. Now, it is true, isn’t it, that ever since you have been at the Maurice Hotel that carpet will curl up once in a while, isn’t that correct?

A. I have seen it curl up a few times. I wouldn’t exactly call it curl up.

Q. You describe it for us.

A. Slightly—not like the pictures that I have looked at. I have seen it risen, or, perhaps a half inch up. [239]

Q. I would like to show you Plaintiff’s Exhibit 1 and ask you to look at the back of it, please, turn it over and look at the back of it, please. Will you read what it says on the back?

A. Photographed April 15, 1957, Kleins Legal Service, San Francisco, California.

Q. And in pencil on the top corner?

A. I can’t make that out. It says the date is

(Testimony of Richard S. Carter.)

3-25-58 and Lucy Cohen deposition. Above that is something which I can't decipher.

Mr. Melchior: Perhaps counsel will stipulate it is Plaintiff's Exhibit 1 for identification.

Mr. Sedgwick: Yes.

Mr. Melchior: Thank you.

Q. Now, Mr. Carter, do you recall being shown this photograph at the time of your deposition?

A. Yes, sir.

Mr. Sedgwick: May I see that photograph again? Is this the one that is in evidence?

Mr. Melchior: Plaintiff's Exhibit 1 in evidence.

Mr. Sedgwick: Already in evidence?

Mr. Melchior: Yes.

Mr. Sedgwick: Oh.

Q. (By Mr. Melchior): Didn't you testify—I am sorry. Do you recall that the carpet looked like that now and then? [240]

A. I never saw—I have never seen two ruffles in it like that.

Q. But you have seen ruffles of that size, have you?

A. I don't know whether they were that size, it is pretty hard to say how big they are in the picture.

Mr. Melchior: Counsel, I would like to read from page 10, line 18 of Mr. Carter's deposition, to page 11, line 17.

Mr. Sedgwick: Stipulated that the questions were asked and the answers given as recorded, your Honor.

(Testimony of Richard S. Carter.)

The Court: All right.

Mr. Melchior: Mr. Carter, do you recall these questions and answers.

“Mr. Melchior: Will you mark these for identification, Plaintiff’s Exhibits 1, 2 and 3.

(Thereupon the photographs above referred to were marked Plaintiff’s Exhibits 1, 2 and 3 for identification.)

“And I have interpolated now and I have given you Plaintiff’s Exhibit 1 of those that were marked, you hold it in your hand.

“Mr. Melchior: Q. Let me show you what has been marked Plaintiff’s Exhibit 1 for identification and ask you what that is, whether you recognize it?

“A. Yes, that’s the lobby of the hotel.

“Q. Is that a fair representation of what the lobby [241] of the hotel looks like.

“Mr. Levy: Now, wait a minute.

“A. No, no, customarily the carpet isn’t up.

“Q. Have you ever seen it up like that?

“A. Similar to it.

“Q. How often?

“A. Oh, very, very seldom.

“Q. How many times would you say in the course of six years?

“A. I wouldn’t honestly be able to give you a correct answer.

“Q. But you have seen it that way now and then?

“A. I have seen it now and then like this.

(Testimony of Richard S. Carter.)

“Q. In just the condition it is in that picture?

“A. Well, approximately. I don’t remember seeing two loops up there, I don’t remember offhand of seeing that, but usually whenever you did anything to it it would be one and I would walk and smooth it down with my foot.”

A. That sounds correct to me, as I remember it.

Q. Now, what did you do to smooth down the carpet?

A. Just smoothed it down with my foot.

Q. Would you put it under the potted plants that were standing in front of the pillars?

A. No, sir. [242]

Q. Did you ever tell anybody that this happens to the carpet now and then?

A. I probably told you; I believe you asked me.

Mr. Sedgwick: I am sorry, your Honor, could I hear the answer?

(Record read by the Reporter.)

Q. (By Mr. Melchior): Did you ever tell the manager about this condition? A. No.

Q. Of the condition of the carpet? No, you never did. And you worked there how many years?

A. Seven years.

Mr. Melchior: That’s all.

The Court: Any further questions?

Mr. Sedgwick: Yes, your Honor.

(Testimony of Richard S. Carter.)

Redirect Examination

Q. (By Mr. Sedgwick): Counsel has read, if your Honor please, from the deposition on page 8, line 17 to page 9, line 10 and on the same subject I would like to read the next four lines. The last question read to the witness was:

“Q. You have seen it before?

“A. I have seen a man catch his heel on there but actually the number of times I couldn’t tell you. It would be very few. [243]

“Q. Before the time of this accident had you seen it happen?

“A. Only before and a long time, two or three years ago.

“Q. Did you say anything about that to anybody when you saw people’s heels catch on it?

“A. No, because it was so unimportant.

“Q. Nobody ever fell, did they, as a result of catching their heels until this happened?

“A. No, no. Sometimes when there was a rain or something it would curl up a little, why, a time or two I have seen a man walk across it, but I have never seen a woman catch her high heel on it at all.”

Mr. Sedgwick: Thank you. Nothing further. You may step down.

The Court: Do you have anything further?

Mr. Melchior: Nothing further, your Honor.

The Court: Step down.

(Witness excused.)

Mr. Sedgwick: Call Mr. Schroeder.

The Court: This will be a good time to take a recess.

While you are out of the courtroom don't talk about the case, ladies and gentlemen of the jury.

(Short recess.) [244]

Mr. Sedgwick: Mr. Schroeder, please.

DOUG E. SCHROEDER

called on behalf of the Defendants, being first duly sworn, testified as follows:

The Clerk: Please state your name, your occupation and your address to the Court and to the jury.

The Witness: Doug E. Schroeder, 1535 Green, Night Clerk at the Maurice Hotel.

Direct Examination

Q. (By Mr. Sedgwick): Mr. Schroeder, how long have you been employed at the Maurice Hotel?

A. Eleven years, going on 12.

Q. During all of that period of time have you been what we call a Desk Clerk there?

A. Correct.

Q. Do you recall, Mr. Schroeder, the morning of August 14, 1957, the day that Mrs. Cohen fell in the lobby of the hotel; you remember that morning?

A. I remember part of it, yes, sir.

Q. Were you on duty there at the time?

A. I was, yes.

Q. What time did you go off duty that morning?

A. 8:00 o'clock. [245]

Q. Can you tell us about what time this accident

(Testimony of Doug E. Schroeder.)

occurred? A. About 20 minutes to 8:00.

Q. Do you have any particular thing that you associate with that to fix that time?

A. Yes, after the accident I noticed that it was that time because Mr. Hoffer came in, our manager; he usually doesn't come in that early.

Q. This was something unusual?

A. That is right, yes, sir.

Q. What time did you go to work on that shift?

A. I usually go to work early, do my work, and so therefore I would say around 11:00 or 11:15.

Q. Do you recall Mrs. Cohen discussing with you how she was going to leave and what time she was going to leave? A. I do.

Q. Would you just tell us what you recall of that, Mr. Schroeder?

A. I do not recall whether it was in the night or whether it was in the morning when she came and her daughter came down, but they were discussing about going to the airport and how long it would take and what the price would be.

Mr. Melchior: Just a moment. I would like to have the foundation laid, counsel, please.

Q. (By Mr. Sedgwick): Where was this conversation, Mr. Schroeder? [246]

A. It was in the lobby, I was in back of the desk and Miss Cohen was on the opposite side of the desk.

Q. Was Mrs. Cohen there?

A. Mrs. Cohen is the one I talked to.

(Testimony of Doug E. Schroeder.)

Q. How about Miss Cohen, you recall whether she was with her or not?

A. I don't recall. I believe Miss Cohen was not there.

Q. I believe you also told us that you do not now recall whether it was in the evening when you first went to work or whether it was in the morning?

A. That is right.

Q. All right. Will you just tell us what was said?

A. Then I told her how to get, to get out to the airport and what the rate would be if she took a cab out to the airport, also what the rate would be from the terminal, and she was undecided at that particular time just which way to go, whether to take a cab to the terminal or to take it over to the airport itself.

Q. Was there any discussion as to the time involved?

A. Not at that time, no. I told her it would take at least around 45 to 50 minutes to go out to the airport. That is what the limousine took going in going out and the cab would take her about a half an hour.

Q. Now, was there any discussion that you recall, any confusion about the time? [247]

A. Not at that time when we were talking, but it seems as through later she found out that there was an hour difference in the time.

Q. All right. Did you actually see this, see Mrs. Cohen fall?

A. No, sir, I did not.

(Testimony of Doug E. Schroeder.)

Q. Did you see her leave from near your desk or from in front of the elevator to a point where she did fall?

A. I don't know exactly what I was doing, but as I looked up from the desk I saw Miss Cohen in a half run, a half walk going towards the door to catch her cab.

Q. Was it immediately thereafter that fall?

A. It was the time—I had turned after I had seen her go by, I turned my head to do something else, I paid no more attention to it because I knew she was going to catch her cab, and as I looked up again that is when I saw where the accident was.

Q. I want to show you three photographs which are marked as Plaintiff's Exhibits 1, 2 and 4 in evidence, ask you to look at them, if you would, please.

A. Yes, sir.

Q. Now, these photographs, all three of them, show the rug that goes across the lobby in front of the entrance door, do they not? [248]

A. Yes, sir.

Q. Have you, during the eleven years that you have been there ever seen the edge of that rug in the condition as shown in these photographs?

A. None that I can recall, sir.

Q. Have you ever seen it raised anything like the condition as shown in these photographs?

A. No.

Q. I'll show you Defendants' Exhibits C, D and E, ask you if that is a fair representation of the

(Testimony of Doug E. Schroeder.)

condition of the lobby rug which lies in front of the entrance doorway?

A. To my knowledge that is the way the rug is always laying. I always walk past it and I have never paid much attention to the rug, but according to my recollection that is the way it lays.

Q. Have you ever seen it any other way?

A. No, sir, I have not.

Mr. Sedgwick: I think that is all, your Honor.

Cross-Examination

Q. (By Mr. Melchior): Mr. Schroeder, where is your post of duty in the lobby of the Maurice Hotel?

Mr. Sedgwick: The what?

Mr. Melchior: The post of duty.

A. Just what do you mean, sir? [249]

Mr. Melchior: Where are you stationed while you are working?

A. I am back of the desk.

Q. I see. Now, where is the desk located in the lobby there; just tell the jury where the desk is located.

A. Well, I have to stop and think. I really can't place it right off quick at hand. Coming in it would be on the right-hand side; going out it is on the left-hand side going out of the door.

Q. Is it at the same floor level as the lobby, Mr. Schroeder? A. Yes.

Q. Do you stand on the floor behind the desk customarily?

(Testimony of Doug E. Schroeder.)

A. That is correct, when working.

Q. That is where you spend all of your time while on duty?

A. That is until I am all through with my work, which is around 3:00 or 4:00 o'clock in the morning and then I sit out on the davenport and read the paper.

Q. Can you show me in one of these exhibits I am going to hand you, Defendant's Exhibit B and C and Plaintiff's Exhibit 1, can you show me in any one of those where you sit when you are not behind the desk?

A. Well, in fact, I don't see the couch. Let's see. I don't see the couch; the couch faces the desk. That's where I sit, so I can hear my telephone and also be right near the desk there. [250]

Q. In other words——

A. Don't go into the office.

Q. You have your face to the desk at that time?

A. That is correct.

Q. Is that right? A. That is correct.

Q. Do you have your face away from the edge of the rug which is marked with a circle here, Defendants' Exhibit B?

A. Yes; my back would be to the back there—it is going out, yes.

Q. Your back would be towards the entrance——

A. No, my back would be going out the door, the door would be here and the aisle goes here, and it is this way (indicating).

Q. When you are behind the desk is there any-

(Testimony of Doug E. Schroeder.)

thing between you and this space between the pillars that is marked with a circle here?

A. There is a post over on the side, yes; there is one of these posts that is on the side which blocks off part of the view, but which you can see the door—part of the door, going out.

Q. And there are potted plants, too, aren't there?

A. That is correct.

Q. There is a long settee set across that place, isn't that right? A. That is right.

Q. You can see that in the picture you have in your hand, isn't that correct? [251]

A. Well, I see the side of it here. Over here on the side, yes.

Q. As a matter of fact, these objects, the pillars and the potted plants and the davenport pretty effectively block your ordinary view of the edge of the carpet, don't they, where the desk is located?

A. Normally I would say yes, that is right up to the desk. Of course, we can see beyond the other carpet, beyond the—when walking. [252]

Q. But this particular place circled on the photograph you can't see?

A. That's right, yes.

Q. Now, as I recall your direct testimony, you said it seems that later it developed there was one hour difference in time.

A. That is right. We were on Daylight Saving Time.

Q. Was anything said about that?

(Testimony of Doug E. Schroeder.)

A. Not at that time that I can recall, because all planes, all trains and everything else are all run on the Daylight Saving Time.

Q. As a matter of fact, Mrs. Cohen had a conversation with you in the evening when she returned to retire for the night, didn't she?

A. As I said, I didn't quite recall whether it was then or whether it was in the morning, was when we had the conversation. I know it was a few minutes—we had talked ten or fifteen minutes.

Q. You talked for ten or fifteen minutes?

A. I would say that we had talked about the time going to the airport, and so on; maybe a little less, maybe no more than ten or fifteen minutes.

Q. For ten or fifteen minutes. You didn't notice any sense of urgency in that conversation?

A. No, there was not. [253]

Q. Now, what is a half run, half walk?

A. Well, I really don't know just how you might want to class it. You're not walking and still you're not running normally. It's a, I would say, a half gait. I don't know just how to explain it to you, but you wouldn't be walking and still you wouldn't be running at a full gait. It is a rather rushy move.

Mr. Melchior: I think that is all. Thank you.

Mr. Sedgwick: I have no further questions. Thank you, Mr. Schroeder.

(Witness excused.)

Mr. Sedgwick: Call Mr. Hoffer, please.

ALEX F. HOFFER

called as a witness by the defendant, being first duly sworn, testified as follows: [254]

* * * * *

Direct Examination * * * * *

Q. (By Mr. Sedgwick): You are at present manager of the Maurice Hotel?

A. That is correct.

Q. That hotel is located where, sir?

A. 761 Post Street.

Q. How long have you been the manager of the Maurice Hotel? A. Fifteen years.

Q. Have you served continuously during that period? A. Continuously.

Q. Can you tell us who is the owner of the Maurice Hotel? A. E. B. DeGolia.

Q. Can you tell us whether Mr. DeGolia owns this hotel as an individual or as an association, a partnership, a corporation, or what?

A. The Maurice Hotel is the personal property of Mr. and Mrs. DeGolia, community property.

Q. Where is Mr. DeGolia at the present time?

A. He is in Notre Dame Hospital; has been for some number of years.

Q. Is he able to come to court.

A. No, he is not; he is incapacitated.

Q. Now, one of the defendants is Western Hotels. Does the Western Hotels own or have any interest in the Maurice Hotel?

A. The Maurice is an affiliate of the Western

(Testimony of Alex F. Hoffer.)

Hotels, not owned or operated by the Western Hotels; it is owned by E. B. DeGolia.

Mr. Melchior: May I move that go out, your Honor? It was admitted in the answer that Western Hotels was and now is managing and operating said premises as agent of the defendant DeGolia; the defendant Western Hotels, a corporation, at all such times was and is maintaining the hotel under the name Hotel Maurice, and at all such times had and now has actual control of the premises. That was admitted in the answer. It's an allegation in Paragraph III of the complaint. I move the answer be stricken.

Mr. Sedgwick: Excuse me, your Honor. I am not certain that is true. May I check it?

The Court: Surely.

Mr. Melchior: To be technically correct, the allegation was not denied and, therefore, stands admitted.

Mr. Sedgwick: I will have to concede, your Honor, that counsel's statement is correct. We will then, of course, [256] have to move the Court for permission to amend the answer to conform to proof at the proper time.

The Court: Any objection?

Mr. Melchior: Well, I wasn't prepared to meet this issue, your Honor.

The Court: Well, the motion is granted. The evidence is in. This is the usual motion to amend the pleading to conform to proof.

Mr. Melchior: I have had no opportunity to

(Testimony of Alex F. Hoffer.)

investigate this or meet it, if there is any way of meeting it. It isn't very important, but——

The Court: No, I don't think it is important at all, one way or the other.

Mr. Melchior: Very well.

The Court: As far as it is admitted or isn't admitted. It is important to fix who owns the place, who owns the hotel, important to know whether the Western group has any interest in it or not and, it being important, I am going to allow counsel to amend his answer to conform to the testimony. Now, the man apparently has knowledge on that subject.

Mr. Sedgwick: Yes, your Honor.

The Court: All right.

Mr. Sedgwick: Thank you, your Honor.

Q. To continue, then, to recapitulate, perhaps, the Maurice Hotel is not operated by Western Hotels? [257] A. No, sir.

Q. The Maurice Hotel is not owned in any part by Western Hotels? A. No, sir.

Q. Would you tell the Court and jury just what this relationship or association between the Western Hotels and the Maurice Hotel is?

A. Well, Mr. DeGolia owns the Maurice Hotel. I worked for him 15 years and at one time we had nothing to do with the arrangement at all. He also owns properties which Western is interested, in, also, and through that there is an affiliation where we make reservations at other Western Hotels; they make them with us and through the teletype

(Testimony of Alex F. Hoffer.)

and credit cards, things of that kind, because of his ownership is some other interests.

Q. Now, Mr. Hoffer, you're familiar with the rug involved here. I am sure you know the one we are referring to. A. Yes, sir.

Q. I am referring to the long rug immediately in front of the entrance to the hotel shown in Defendant's Exhibit D there.

A. Yes, sir, I know the rug. I bought them.

Q. That was my next question. Did you purchase these rugs?

A. Yes, sir; I bought them myself.

Q. Are the two rugs there substantially the same?

A. Two rugs of the same size.

Q. What is the size, approximately? [258]

A. Roughly 11 x 31. That's from memory now. I wouldn't want to be quoted to the inches on that. That is at the time of purchase, that is what they were.

Q. Do they have some sort of a pad underneath them?

A. They have a pad underneath them.

Q. Where did you purchase the rugs?

A. Sloane's designed them for us. They are chenille made by Mohawk. Sloane designed them for us.

Q. When did you purchase them from Sloane's?

A. 1946.

Q. When you say "Sloane's," you mean W. and J. Sloane? A. That is correct.

(Testimony of Alex F. Hoffer.)

Q. You say "manufactured by Mohawk." Is that an American company?

A. Mohawk is an American carpet company, yes, sir.

Q. Are these rugs manufactured in America; in the U. S.?

A. Manufactured in America.

Q. They are not Chinese rugs?

A. No, sir. They are what they call a chenille or woll chenille.

Q. Now, do the pads come out, completely out to the edge or side edge of the rug?

A. No, the pad does not come out to the edge of the rug. If they did, it would be all wrong; you have to allow for the drop of your rug to come down, depending upon the thickness [259] of your rug. Why, you got to cut your pad further back so that you allow a contour to it, and depending upon the thickness of your padding—if you use a 40-ounce felt, rubber or other equipment, it has to have a certain spread.

Mr. Melchior: I move this answer be stricken on the ground your Honor has ruled for the purposes of this case that the jury themselves are to be the judges of how the rug should be properly laid and is not a matter of expert testimony. Moreover, this gentleman has not been shown to have any particular qualifications.

The Court: He isn't talking about any expert testimony; he is talking about whether there is a space between the edge of the rug and the mat.

(Testimony of Alex F. Hoffer.)

Mr. Melchior: That much I agree——

The Court: Why they left this space; nothing expert about that. The objection is overruled.

Q. (By Mr. Sedgwick): About how much—can I call it “overlap” or “overhang” is there? How far does the rug extend past the side of the mat, approximately?

A. Oh, our rugs, I imagine, at the present time have around a four-inch overlap.

Q. Mr. Hoffer, when was the first time, to your knowledge, that you ever saw Mrs. Lucy Cohen, or her daughter, Miss Gene Cohen?

A. On the morning that she had this accident. I came in [260] and she was sitting on the chair or settee there and Mr. Lohman remarked, “What’s this all about”? That is the first time I saw her.

Q. Were you in the hotel at the time the accident occurred? A. I was not.

Q. Had you been there that morning at all?

A. No, sir, I had not.

Q. Did you meet or talk to Mrs. Cohen on the evening before?

A. I do not recall having met her the night before.

Q. Do you recall her having given you a letter of—well, a letter of recommendation? I guess that isn’t quite right.

The Court: Confirmation of a reservation, wasn’t it?

Mr. Sedgwick: No, I understood that——

The Court: You tell us what it was.

(Testimony of Alex F. Hoffer.)

The Witness: Well, my recollection of it, of this incident, is that she wrote in one or two letters asking about accommodations and I confirmed accommodations to her, which is our custom on that, and I did not see her. That was all done—she lives in the East and then she came in one evening. I was not there, and that morning when she fell down, why, I came in about twenty minutes to eight and there she was. I did not see her that I know of.

Q. Do you know approximately how long before you reached the hotel the accident had occurred?

Mr. Melchior: I object to that. That would be hearsay. He wasn't there. [261]

The Court: I don't suppose when she reached the hotel is a matter of personal knowledge.

Mr. Melchior: When she reached the hotel to check in the first time?

The Court: Did you see her?

The Witness: No, I did not, so I did not know when she checked into the hotel.

Mr. Sedgwick: I am sorry, your Honor, I meant to ask him if he knew about what time the accident occurred.

Mr. Melchior: I object—

The Witness: Yes, I do.

Mr. Melchior: I object, your Honor. He wasn't there and he would know only what he heard through others.

(Testimony of Alex F. Hoffer.)

The Court: Well, were you in the lobby when this woman fell down?

The Witness: I was not.

The Court: All right, I guess he doesn't have any personal knowledge.

Mr. Sedgwick: What did you see when you first came in?

A. I came into the hotel and my auditor was there and talking to a lady that was sitting down and I said, "What's this all about?" He said, "Mr. Hoffer, I just got here. Doug Schroeder called me; this lady fell down." That's all I know about it. [262] I said, "Okay," and then I stepped in.

Q. Did you inquire as to whether a doctor had been called?

A. Yes, I talked to Mrs. Cohen then and asked her how she was, what I could do for her. She was sitting up, as I recall, at the time and, oh, she says, "Nothing at all; just let me be. I am all right. I don't want to be bothered." She didn't use the word "all right," but "Don't bother me." And then I stepped back to the desk to see who she was, what it was all about, and I talked to Mr. Schroeder and he told me who she was and I came back and I says to her, "Can't you get a doctor, get this straightened up?" She says, "No, my daughter is taking care of the doctor." I suggested she go back to her room and she didn't want to.

Q. Was anything said about the rug at that time? A. No, sir.

Q. At any time during any conversations you

(Testimony of Alex F. Hoffer.)

had with either Mrs. Cohen or her daughter, Miss Gene Cohen, was anything said about the rug?

A. Not at that time. I did talk to the daughter, not at that time; later on there was a conversation; not at that moment.

Q. Who was present at the later conversation that you are referring to?

A. Well, I believe her attorney commented about it and, as I recall, Mrs. Cohen called me on the phone and told me about it. [263]

Q. Were you present at any conversations where Mr. Carter was discussing the rug with Mrs. Cohen or Mr. Melchior?

A. No, sir.

Q. Did you ever talk to Mrs. Cohen before this accident?

A. I had not.

Q. Did you notice the type of shoes that she was wearing that morning?

A. Yes, she had a high-heeled shoe on, what we call French heels.

Q. Did you ever tell anyone or hear anybody in your employ state that this rug was a dangerous condition?

A. I have not.

Q. Has anyone else ever fallen and presented a claim as the result of those rugs?

A. In the 15 years I have been there, 12 years the rugs have been laid, never any problem.

Q. What is the condition of the rug at the present time?

Mr. Melchior: I object——

The Witness: It is in good shape.

The Court: Well, the objection is overruled. It's

(Testimony of Alex F. Hoffer.)

in good shape—of course, the basis of your objection, Mr. Melchior, is that it is not material because it isn't at the time of the accident. Now, I would like the jury to understand the basis of my ruling. The basis of my ruling is that, if [264] that is the same rug and it is now in good shape, the fair inference can be drawn that at the time of the accident it was in good shape.

Q. (By Mr. Sedgwick): It is the same rug there now that was there at the time of the accident? A. Same rug is there.

Q. Has there been any repairs, anything done to it since the accident to the present day?

A. No.

Q. Nothing been changed? A. No, sir.

Q. I show you three photographs, which are Plaintiff's Exhibits 1, 3 and 4 in evidence, showing the rug we have been talking about, in particular the side away from the front entrance, ask you to look at those photographs. A. Yes, sir.

Q. Have you seen them, sir?

A. I see them.

Q. Have you ever seen that rug in the condition as shown in these photographs?

A. The only time I have ever seen the rug in that condition is the day that Miss Cohen and her attorney arranged it that way when they took pictures.

Q. I show you Defendant's Exhibits C, D and E, and ask you to look at them, if you will, please.

A. Yes, sir. [265]

(Testimony of Alex F. Hoffer.)

Q. Do Defendant's Exhibits C, D and E correctly and accurately show the condition of that rug?

A. That is the normal condition of the rugs.

Mr. Sedgwick: I think that is all. You may cross-examine.

Cross-Examination

Q. (By Mr. Melchior): Mr. Hoffer, just what is the relation between Mr. DeGolia and Western Hotels? A. Mr. DeGolia owns the hotel.

Q. The Western Hotels?

A. Western Hotels does not own the hotel; it is an affiliate arrangement.

Q. I didn't quite understand your direct testimony——

The Court: May I interrupt for a moment? If you will excuse me, I have a phone call.

While you are out of the courtroom, ladies and gentlemen, don't talk about this case.

(Short recess.)

Mr. Melchior: May I proceed, your Honor?

The Court: Yes.

Q. (By Mr. Melchior): Mr. Hoffer, you have testified that the rug is now in good condition?

A. Yes, sir. [266]

Q. Just exactly what do you mean by that? Describe the way in which it lies on the floor.

A. It lies level on the floor, just like any ordinary rug does.

(Testimony of Alex F. Hoffer.)

Q. Have you ever tried to pick it up with your toe or with any implement at all at the edges?

A. No, I don't go around trying things like that. Pick it up with my toe? No, no reason to.

Q. Never made any experiments after this accident, have you?

A. Absolutely not. Put my toe deliberately under the rug and raise it?

Q. I am just asking you whether you made any effort to see whether it comes up easily or with difficulty.

A. I know many people have walked and have had no problems. I have made no specific effort to get down there and try to lift it up; no, sir, I haven't.

Q. I am not talking about getting down there. Have you ever made any effort any time——

A. Or standing up I have not.

Q. Have you ever noticed that the rug does not lie evenly in a straight line along the edge of the floor, but waves in and out? Have you ever noticed that? A. I have not.

Q. Not to this day? A. No, sir. [267]

Q. At any time? A. No, sir.

Q. You have never seen it raised in any kind of a loop of any kind whatever at the edge, have you?

A. Now, when you say "loop," that's an awfully big word. Let's say I have seen times when it was a quarter of an inch high.

The Court: All right.

(Testimony of Alex F. Hoffer.)

Q. (By Mr. Melchior): When it's up——

A. Maybe a quarter of an inch, raised a trifle, a quarter of an inch or some fractional part of an inch, but to call it a "loop," that is a pretty hard thing to say.

Q. What is the highest you have even seen it?

A. Oh, I'd say perhaps at times it has been something—maybe a quarter of an inch or maybe at one time a little section—if you want to come down to perfection——

Q. What was the last part of your answer?

A. If you want to look for perfection down to perhaps a quarter of an inch in one little minute section over a period of the 12 years.

Q. Now, actually, after 12 years this rug is now showing some serious signs of wear, isn't it?

A. It is not. Now what I would call serious.

Q. I am going to show you Plaintiff's Exhibit 2 and ask you whether at the edge opposite the door—Excuse me, your Honor, [268] may I ask the question from here because——

The Court: Yes, go ahead.

Q. (By Mr. Melchior): I would ask you whether it is not true that at the place opposite the right door near the edge away from the door, within the second colored border, dark border, and then there is a light border——

A. Here?

Q. Opposite the right-hand door as you look at the picture, whether there isn't a place there where the nap is off the rug and you can see the nap?

(Testimony of Alex F. Hoffer.)

A. May possibly be where you can see, if you look deep between the piles, yes; that is true of any rug.

Q. I am asking you whether you can see it on that picture there.

A. I cannot see it, no. Can you?

Q. I certainly can, yes, sir.

Mr. Melchior: I am showing, for the record—I am describing——

The Court: What do you mean, are you going to locate something?

Mr. Melchior: I am going to locate something on the photograph; yes, your Honor.

The Court: The photograph will speak for itself.

Mr. Melchior: Very well.

The Court: If you want me to testify. [269]

Mr. Melchior: All right. May I pass the photograph to the jury?

The Court: Sure, you can pass the photograph to the jury and tell them what to look for.

Mr. Melchior: I ask the jurors to look at the place opposite the right-hand door at the edge of the rug, away from the door, inside the second colored border. I am going to point to it, if I may. Right there. (Passing photograph to the jury.)

The Court: I am not going to have you follow it all the way around the jurors with that. Go ahead with your examination.

Q. (By Mr. Melchior): Now, Mr. Hoffer, when you first came into the lobby, the accident had already happened that morning, hadn't it?

(Testimony of Alex F. Hoffer.)

A. That is correct.

Q. Did you make any effort to re-assure Mrs. Cohen?

A. Re-assure? In what way? I asked her how she was and what I could do for her.

Q. Did you offer to do anything for her?

A. Yes, sir. Can I get a doctor for her. Her daughter was getting a doctor for her.

Q. Didn't you tell Mrs. Cohen at that time that the hotel had no house doctor and that it would be better if she got her own doctor? [270]

A. I did not.

Q. May I finish my question, please?

A. You may.

Q. Didn't you tell Mrs. Cohen at the time she was sitting on the settee, right after the accident, that the hotel had no house doctor and it would be advisable for her to get her own doctor, a doctor of her own choosing, because it was difficult to get in the hospitals in San Francisco without reference from a private physician?

A. You are absolutely mistaken. I said no such thing at all. In fact, the doctor was arranged for when I got there.

Q. You are quite certain about that?

A. I made no arrangements for any doctor; I am very certain of that. She told me she had arranged for a doctor, her daughter had.

(Testimony of Alex F. Hoffer.)

Q. You are certain, are you, that you did not ask her to do that?

A. I, as an individual, did not ask her to do that; that is very correct.

Q. Didn't you, at the time when you came into the lobby, insist that Mrs. Cohen be taken back to her room, although she wanted to be left on the settee?

A. I did not insist. I asked her if she didn't want to go to her room.

Q. What did she say? [271]

A. She said no.

Q. How did it happen that she went to her room?

A. Later on she said she wanted to go. After I talked to her, I talked to her at the time and found out that she had called her doctor—her daughter had called the doctor and made arrangements—she wanted to stay there, didn't want to stay up in the room. There was a room upstairs for her. Why, I went down in the back of the house and made my rounds and ordered my groceries and things of that kind.

Q. Isn't it true that you wanted her up in the room and out of the sight of the guests in the lobby and you took her up to her room, despite her—

A. I did not take her to her room.

Q. Or arrange to have her taken to the room?

A. I did not.

Mr. Melchior: That's all, sir.

(Testimony of Alex F. Hoffer.)

Redirect Examination

Q. (By Mr. Sedgwick): Mr. Hoffer, about how many people come in and out of the hotel a day through the lobby?

A. Well, we have an average house count of about 225 people a day in the house and those people will come and go at a minimum of once a day, so you got 450 at the very minimum trips made there. I think it should be safe to say a thousand trips a day would be probably somewhere correct.

Q. At what time did you arrive at the hotel that morning? [272]

A. At twenty minutes to eight.

Q. Do you have any particular reason for setting that time?

A. Yes, for the reason that I normally go to work at eight o'clock, eight to five. My daughter works at a bank and I take her to work at about five minutes to eight. If I get her there 20 minutes to eight, she doesn't like it and I was there early for some reason that I don't know and I know I marked it in my mind, "Good gracious, why should I pick this time to come early when something like this happens?"

Mr. Sedgwick: That is all.

Mr. Melchior: No further questions. [273]

* * * * *

(Proceedings had outside the presence of the jury.)

(Motion made by defendants to dismiss as to the Western Hotels. Reported but not made a part of this transcript.)

(Upon hearing the motion, the motion to dismiss was granted.)

The Court: Now, so far as the instructions are concerned and your objections to them, I will tell you what my practice is and if there is anything you want me to do about it different than I do, why, if you will suggest it, I will give some thought to it.

Now, my practice is to charge the jury orally. I don't read the requests and I don't read anything that I have written, more than a few notes. You will find on these three or four little sheets of notepaper my charge to the jury, notes that I have and from which I am going to charge.

Now, this is a simple case. It's an important case to the people concerned, but in terms of trying thousands of cases a year which I try this is a simple case. I shall turn to the jury and talk to them about it face to face. I have never had any confidence that you're helping the jury much by reading a bunch of requests to them.

Now, the tack I shall take is to give the usual charge on the duty of a proprietor of a property to an invitee, and I shall discuss that. If there is any deviation from that duty, there is a breach and there may be negligence. I will [274] leave it to the jury the question whether or not the proprietor of the hotel or his employees, any of them, failed to exercise ordinary and reasonable care and

diligence in the maintenance and care of that carpet in the lobby, because that's all we are concerned with, no other negligence charged.

Mr. Melchior: That's correct.

The Court: And I shall ask the jury to determine whether or not, if they find some negligence, if any, it is the direct and proximate cause of this lady's injuries, and I shall leave to the jury the question whether or not, taking into account all facts and circumstances in evidence, Mrs. Cohen failed in any wise to exercise ordinary and reasonable care and prudence for her own safety, and if they find that she failed in any wise so to do and that failure contributed to her injury, then they are to find their verdict for the defendant in this case. That is, the defense of contributory negligence, I suppose in California, as elsewhere, is a defense to negligence.

And I shall charge the jury that since Mrs. Cohen was a guest of the hotel, that if they find that the proprietor of the hotel or employees knew of any dangerous condition, if they find there was a dangerous condition, it is the duty of the people, the officers, the employees, to notify either of them; if they don't, why, there is liability. And then I shall charge the jury that if they find either the hotel or its agents was lacking in ordinary and reasonable care and diligence to maintain [275] it properly, keep that carpet up, that it caused the injury, directly and proximately caused the injury, and if they find that Mrs. Cohen was not in any wise negligent or if she was negligent in

such a way that didn't contribute to the injury, then I will say to them now you come to the question of damages. And I shall say to them that it is my duty to charge you on the issue of damages as it is my duty to charge you on all issues in this case, that I don't want you to assume that by talking about damages I am indicating any views of my own on the subject of whether or not there is negligence on either party in this lawsuit. It's not my job to do so; you are the sole judges of those questions. I charge you on the subject of damages merely because it is one of the things you are going to have to consider and it is my duty to give you the law on that subject as well as on the other subjects. Then I shall give the usual charge on damages, pain and suffering and all the rest of it.

Now, you have some special damages here and the special damages you have spelled out. I am going to have to talk to the jury about that; I am not going to to talk about that, talk about those in a very general way. I am going to charge them generally; I am not going to make any comment on the evidence in this case. I don't think it calls for any. I shan't intrude my views on them.

So that is about what I am going to do. Now, I [276] notice upon the bench when I came back today the defendants have additional jury instructions. I haven't read those additional instructions and I don't know whether that will have anything in it that I am going to add or not. That is about the way I charge, and I shall take some of the

things from both of your requests. I have some notes here.

Oh, yes, I am going to talk about the burden of proof. The burden is upon the plaintiff in a case of this kind to produce evidence before the jury which they believe and which satisfies them by a preponderance of the evidence that the hotel was either negligent or the hotel people knew of the danger and failed to inform her; the burden is upon the plaintiff to show that if there was negligence that it was the direct and proximate cause of the injury and the burden is on the plaintiff to show that injury by a preponderance of the evidence.

On the subject of contributory negligence, the burden of proof here in California is the same as it is generally in the United States as an affirmative defense, and the burden is upon the defendant to produce evidence which the jury believes and satisfies their minds by a preponderance of the evidence that Mrs. Cohen was lacking in the exercise of ordinary and reasonable care for her own safety and that negligence, if any they find, contributed to the injury she has suffered, she can't recover. [277]

It looks like I am going to give Plaintiff's No. 3—I have got Plaintiff's No. 3 on here—and No. 4 and Plaintiff's Exhibit 7. I don't mean to say I am going to read it to them; I am going to give the substance. Plaintiff's No. 8, you want those in—am I going too fast for you? Take a look at these overnight. I am not going to do it now.

Mr. Sedgwick: No. 8 was one, your Honor?

The Court: No. 3, No. 4, No. 7, No. 8, Plaintiff's No. 9, invitee, I am going to cover that. Also going to say that a corporation acts through its officers and employees and I am going to say that the knowledge of the officers and employees are attributable to the corporation. There is no corporation involved here, is there?

Mr. Melchior: No, your Honor.

The Court: No corporation involved. So I better get rid of that one. Whatever the Western Hotels is involved in I won't give.

Now, of course, I should give, I suppose, the owner of the place is responsible for the acts of the employees,—agency, in other words—that is involved here, and I suppose we ought to give one on agency.

Now, Plaintiff's No. 23, 24, 25 and 26 on damages, I am going to give the substance of that. I am not going to read it.

Life expectancy, I won't need to give any charge [278] on it; you are going to argue that to the jury.

Mr. Melchior: Very well. I did not supply the age, the number of years at the time, your Honor, because I wanted to obtain the agreement of counsel to that.

The Court: Now, her sick or annual leave, is there any problem about that?

Mr. Melchior: I think it is clear that under the law I have submitted this charge that reimbursement from an extraneous source——

The Court: I think that is clear. I have had that problem before, of course, as I go around. That is generally so. I don't know whether the law of damages in California is any different.

The fact that the United States Government allows her sick or annual leave which compensates her for the time she is away is not to be taken into account at all; if the defendant is negligent, she is entitled to recover anything from them, why, you can't depend on the basis somebody else has paid you.

Mr. Melchior: That's our instruction No. 30.

The Court: I had a case like that over in Topeka, Kansas. I travel all over this part of the country. The case there was whether the plaintiff could recover against the defendant for damages, though an employees' insurance group paid the hospital bills of some \$6,000. Of course, the Kansas law was clear. You don't need that. [279]

I am going to give Defendants' No. 6 and 7, in effect. That is concerned with the definition of negligence, and I think that is defined properly there.

I am going to say, as the defendant has asked me to, that the hotel is not an insurer. Of course, the hotel is liable only if the hotel has been negligent, if that negligence has directly and proximately caused her injury and if she isn't negligent, such negligence contributed to her injury.

Now, contributory negligence. I am going to cover that about the way you do in Defendants' No. 14. That is about the way I had intended to proceed and I was very apprehensive this morning.

I came back on the bench—I had been to Salt Lake for a few days and I got here yesterday and I came back and this desk was all cleaned up—a beautiful housekeeping job here—and I thought my little notes that I had left here had all been disposed of and thought I would have to do that all over. My Clerk, who has assisted me so much, had placed those under the blotter, so we have them.

Now, is there anything else you want to take up with me about those instructions? I don't go through them and say give or refuse or modified or anything like that. When I get through the substance of both of your requests are going to be there. I am not going to give them the way they are requested, maybe a different emphasis. I found out that the difference between the requests, the law as stated, was a difference in emphasis. [280]

Mr. Melchior: Certain. I certainly have no objection whatever to your Honor's proposed charge as you have outlined it. I would like to make this one request. Our Supreme Court decided about six weeks ago, the case on which I submitted a number of instructions, Laird against T. W. Mather, Incorporated, 51 Advance California Reports 208, and there are certain matters in that with respect to contributory negligence under such circumstances which are covered in my Instructions No. 18, 19 and 20.

The Court: I am not going to give that specific—you think that the California case is any different

from the broad statements I have just been making about it?

Mr. Melchior: It is a little more specific.

Mr. Sedgwick: It hasn't changed anything, your Honor.

The Court: Contributory negligence?

Mr. Melchior: That's right. In effect—I will read the captions of my 18, 19 and 20 I think sets forth what I propose, contributory negligence with respect to unanticipated danger, failure to observe obvious danger and assumption that the way is clear. I have taken those verbatim or substantially verbatim from that case.

The Court: From the opinion?

Mr. Melchior: From the opinion, yes. [281]

The Court: Well, you see, that Court was not charging the jury. There is a lot of difference between sitting back in your chambers and writing out a little treatise on the law than turning around and talking to the jury about the case. In fact, the longer I work on the court the more I believe that an Appellate Court judge should be a trial judge for a while.

Mr. Sedgwick: I certainly would agree with that.

Mr. Melchior: I agree with that.

Mr. Sedgwick: They ought to have three months a year on a——

Mr. Melchior: Well, as I said earlier out of the hearing of the jury, I am not a personal injury lawyer, but I have done a lot of trial work in tax cases, and I very definitely agree with your [282] Honor.

* * * * *

Mr. Melchior: Certainly will be.

And the only other point that I wanted to make was with respect to the Western Hotels. I think my position on that is clear. I didn't know until about three o'clock this afternoon that the position would vary from that in the pleadings.

The Court: You don't need to raise that again. You have a record on it.

Mr. Melchior: I just wanted to protect my record.

The Court: Well, you certainly made your record on it.

Call the jury.

(The jury returns to the courtroom.)

The Court: I said that I would allow you to ask those four or five questions tonight, but I notice it is ten minutes to five; it is time we went home.

Ladies and gentlemen of the jury, while you are away from us don't talk about this case with anybody and don't permit anybody to talk to you about it. We will reconvene tomorrow morning at ten o'clock. I will tell you what you can expect in the morning. There will be just four or five more questions by the plaintiff and perhaps a question or two by the defendant on cross-examination, and then counsel are going to address you. Each one will tell you what they think the evidence proved and what they think the other fellow hasn't proved, and then the Court will charge you concerning the

law that controls this case, [283] and then we will submit it to you. [284]

* * * * *

Mr. Sedgwick: Now, if your Honor please, before we rest may I offer for filing the amendment to the answer to conform to the proof in accordance with the Court's order?

The Court: Do you have any objection?

Mr. Melchior: No objection. I have the objection which I had yesterday noted on the record, but no objection as to the form.

The Court: The amendment is allowed. [286]

* * * * *

Instructions to the Jury by the Court

The Court: Ladies and gentlemen of the jury, you have heard the evidence in this case. You have listened to counsel and now it becomes your duty and my obligation for you to listen and me to tell you what law controls in this case.

Now, when you were sworn in at the beginning of this trial I admonished you that you should lay aside all prejudice, bias, passion, sympathy; all of those considerations you must leave outside the jury room. You took an oath that you would do that.

I also admonished you that you should decide this case on the evidence, and I told you that the evidence would consist of the testimony as it falls from the mouths of the sworn witnesses who sat there on the chair and whom you observed; and

the evidence also consists of the exhibits which have been received in evidence here.

Now, it is your duty, your solemn obligation to decide this case on that evidence, laying aside every other consideration of any kind or nature whatsoever.

This suit is brought by Mrs. Cohen, Mrs. Lucy Cohen, of Washington, D. C., against a man and his wife who are named here and whom I don't know, of course, and you don't know, Mr. E. B. DeGolia and his wife, two individuals who own the Maurice Hotel and who live in San Francisco. [287]

This case is here in the Federal court because a citizen of the District of Columbia is suing a citizen of California. We have a statute that confers jurisdiction on this court where diversity of citizenship exists, and that's what I mean by "diversity," the citizen of one State or the District of Columbia is suing a citizen of another state. That's why the case is here in Federal court; it wouldn't be here otherwise. If they were both citizens of the same State, it would be over in the State court.

As I say, Mrs. Cohen is suing Mr. DeGolia and his wife and she claims, first, that Mr. DeGolia and his wife were the owner of the hotel and were negligent. Now, the claimed negligence concerns only the condition of that rug—nothing else.

Secondly, Mrs. Cohen claims that the negligence, if any, of the hotel owners was the direct and proximate cause of her injury. Thirdly, Mrs. Cohen claims that she has sustained an injury resulting

from the negligence of the defendants. Fourthly, she claims damages in the amounts that have been mentioned to you.

Now, ladies and gentlemen of the jury, on the other hand, the defendants, Mr. DeGolia and his wife, the owners of the hotel, deny that they were in any wise negligent. They deny that the negligence, if any you find was the direct and proximate cause of her injury. [288]

The defendants deny that she has been injured in the amounts—suffered damages in the amounts and to the extent claimed.

The defendants claim that Mrs. Cohen was herself negligent the morning of this injury and that her negligence contributed in some measure, at least, to cause the accident and the injury.

Now, I have attempted to state the claims and the denials of the respective parties to this lawsuit so that you may have clearly in mind what the issues are which the Court is going to submit to you and call upon you to decide for us.

Now, the first issue in this case that is presented by the claim of Mrs. Cohen and the denial of the defendant is the issue of negligence.

Now, I must tell you about that, ladies and gentlemen of the jury. To start with, I will say to you folks that the mere fact that Mrs. Cohen tripped or fell, if you should find that she did trip or fall on the rug that morning, the mere fact does not entitle her to recover anything here. She is entitled to recover only if the defendants were in some way blameworthy, in some way responsible for her tripping and falling.

Now, the hotel proprietors, not only these hotel proprietors, but others, folks who serve the public, are not insurers, they don't insure against injury and they don't carry [289] that kind of legal responsibility. Mr. DeGolia and his wife, the defendants here, are going to be responsible and liable only, ladies and gentlemen of the jury, if they were negligent in their care and maintenance of the carpet in question at the time and place of this injury.

Now, what do we mean by "negligence"? Negligence, ladies and gentlemen of the jury, means that a defendant has either acted in some way that an ordinarily prudent person would not have acted, or has failed to act in such a way as an ordinarily prudent person would not have failed to act.

In other words, negligence may be commission or omission; it may be an act or a failure to act. The standard to which the law holds us all in our duty to others as it relates to the question of negligence is, ladies and gentlemen of the jury, that we must act as an ordinary, reasonable person would act under the same circumstances, having regard to all of the facts and circumstances in the case.

So what we are really asking you to decide first, ladies and gentlemen of the jury, is, did the hotel proprietors, or their servants or agents, do anything here that an ordinarily prudent person would have done, or did they fail to do anything here that an ordinarily prudent person would have done. The standards to which these people are held is to act in a way in which ordinarily prudent people

act in like circumstances. So the first thing to do is to decide that one. [290]

Now, if you decide that against the defendants, you still are not entitled to give Mrs. Cohen your verdict; you have another issue you must decide and that issue is, if you find that the proprietors, or their servants or agents, failed to do something an ordinarily prudent person would have done or did something an ordinarily prudent person would not have done—if, in other words, you find them negligent, then next you must find, in order to return a verdict for Mrs. Cohen, you must find for her on the issue was the hotel's negligence, if any you find, the direct and proximate cause of her injury.

Now, if you find that it was, you still may not return a verdict for Mrs. Cohen unless you also find that Mrs. Cohen herself, on the occasion of the morning in question, was acting with ordinary and reasonable care and prudence for her own safety. If you find she did not, ladies and gentlemen of the jury, that is a defense to any recovery whatsoever. That is what is called contributory negligence.

Contributory negligence means simply that if Mrs. Cohen failed to act as an ordinary prudent person would have acted on that occasion and that if her failure to look out for her own safety by so failing to act contributed in any measure to cause her injury, she may not recover and your verdict should be for the defendants.

Now, ladies and gentlemen of the jury, Mrs.

Cohen claims the defendants were negligent, that negligence was the [291] direct and proximate cause of her injury and that she sustained an injury from it and suffered damage. On all of those questions, ladies and gentlemen of the jury, Mrs. Cohen, the plaintiff in this case, has the burden of proof.

Now, by "burden of proof" I mean that Mrs. Cohen carries the burden of producing witnesses here and exhibits whom you believe and which satisfies your minds by a preponderance of the evidence.

Now, ladies and gentlemen of the jury, on the issue of contributory negligence, that is to say that the defendant claims that Mrs. Cohen was herself negligent, she wasn't acting with ordinary care and prudence for her own safety, and that that contributed to cause the accident; on that issue, ladies and gentlemen of the jury, the defendant has the burden of producing evidence which you believe and which satisfies your minds by a preponderance thereon.

When I use the word "preponderance," or the phrase "preponderance of the evidence," I mean, ladies and gentlemen, simply the greater weight of the evidence.

Ladies and gentlemen of the jury, there are only two parties left in this lawsuit, the plaintiff on the one side and the DeGolias on the other, the Western Hotels, Inc., having been dropped out of this lawsuit; the lawsuit has been dismissed as to them.

Ladies and gentlemen of the jury, in a case of [292] this sort you are to exercise sound judgment and good common sense. That's why we have a jury here. The jury is a fair cross-section of the citizenry of the State. We don't leave these questions to a man in an ivory tower who is disassociated from the everyday affairs of life. We call in a jury, lay people, a fair cross-section of the citizenry, and we do that to have you bring to bear on the solution of the problem the good judgment and sound common sense of the citizenry at large.

Now, up to this point, ladies and gentlemen of the jury, I have been addressing you on the subject of liability, I haven't said anything about damages at all. If you find that the defendant was not negligent, as I defined it to you, or if you should find that the negligence, if any you should find, was not the direct and proximate cause of the injury, then your verdict should be for the defendant in this case. No cause of action. Likewise, if you should find that Mrs. Cohen failed to exercise ordinary and reasonable care for her own protection and safety, that that contributed to cause the accident and injury, your verdict should be for the defendant in this case.

On the other hand, ladies and gentlemen, if you find the defendants negligent in the case in the care and maintenance of the carpet at the time and place in question and if you find that that negligence, if any, was the direct and proximate cause of the accident, then you should return your verdict

for the plaintiff, unless you also find that [293] Mrs. Cohen was herself negligent, was herself wanting in the exercise of ordinary and reasonable care and prudence for her own safety, in which event you should find for the defendant.

Now, should your verdict on the subject of liability, about which I have been addressing you, be for the plaintiff, then you should assess her damages, ladies and gentlemen of the jury. I would not want you to assume from anything I say on the subject of damages that I am indicating to you in any way at all that I think she ought to recover, or, on the other hand, that I think she ought not to recover. It is my duty to tell you what the law is about all the questions in the case, and one of the questions is damages, and so it is my duty to tell you what the law is on the subject of damages, and when I do it I don't want you to make any assumptions or draw any inferences that I am indicating one way or the other whether she ought to recover.

Now, on the subject of damages, ladies and gentlemen of the jury, if your verdict on liability is for her, you are entitled to take into account these elements in arriving at your verdict: Take into account her medical expenses, doctor bills, hospitalization, sedatives and anesthetics, drugs, all those things, things of that nature, without attempting to spell them all out. You may take into account her actual, reasonably necessary out-of-pocket outlays or articles of that kind and other things that you find, if you do find, are reasonably

necessary as a result of the defendants' conduct, if you find them in any wise negligent and wrongful and your verdict is for the plaintiff. You may take into account her physical injury that she sustained, the extent of her disability, if any you find, how long it will last in the future, if you find it is reasonably likely to do so. You may take into account, ladies and gentlemen of the jury, the pain and suffering that she endured at the time of the accident and since up to the present, pain and suffering, if any you find that she is sustaining now and any future pain and suffering which you find, ladies and gentlemen of the jury, in the exercise of your good judgment and sound common sense is fairly and reasonably likely to be sustained in the future.

Now, ladies and gentlemen of the jury, if there is a disability and you find it and it reduces her earning power, her earning capacity, you may take that into account. It is for you to determine. If you find, ladies and gentlemen of the jury, that she lost any income by reason of being ill, undergoing an operation, hospitalized or crippled, disabled in any way, as a consequence of the accident, you may take that into account in arriving at your verdict.

Now, ladies and gentlemen of the jury, in the main the theory of the law with respect to damages is that damages are compensatory. We attempt by the payment of damages to return the injured person to somewhat near the status quo ante, and by [295] that I mean to compensate her

for her loss, not to punish the defendant, make her whole again. That's the theory.

Now, ladies and gentlemen of the jury, one word of caution about all of these questions and particularly the question of damages. You are to decide these questions on the evidence. Your verdict should not be based upon whim, imagination, fanciful reasoning of any kind. Look at that evidence. Your verdict must be based upon the evidence, the evidence only. And from that evidence you may allow her, if you find she is entitled to recover at all, damages that are reasonably necessary that she has sustained or reasonably necessary to be sustained in the future, and the damages must, in any event, be fair and reasonable.

Now, ladies and gentlemen of the jury, you are called upon to perform here one of the most solemn duties that we know. You are called upon, ladies and gentlemen, to do justice between Mrs. Lucy Cohen, the plaintiff, and Mr. and Mrs. DeGolia, the defendants. Do it objectively, fairly, and base it upon the evidence in the case.

Ladies and gentlemen of the jury, you are the sole judges of the questions the Court is submitting to you; you are the sole judges of the facts in this case and you are the sole judges of the credibility of the witnesses. By "credibility of the witnesses" I mean it is for you to determine what you will believe and whom you will believe. If there is any conflict that [296] you find in the testimony of the witnesses here, it is your duty to reconcile the conflict from the evidence, if you

can; if you can't reconcile it, then it is for you to believe what you will and whom you will. It is for you to determine, ladies and gentlemen of the jury, where the ultimate truth in this case lies.

Mrs. Cohen was a guest at the hotel. As a guest she was, what we call in the law, an invitee. She was invited there along with the public generally.

The Court charges you that the hotel owes to her the kind of duty I have already defined, the duty to exercise ordinary, reasonable care and prudence to maintain that carpet in reasonably safe condition. If the hotel knew about some dangerous condition, the hotel is under a duty to disclose that to the invitee. It is for you to determine whether there was any such situation as that in this case.

Mrs. Cohen is an employee of the United States Government and as such employee she gets sick leave and she gets annual leave and all that amounts to is, she can be off sick, she can be off on a vacation for a certain period each year and draw her pay for it. Now, the fact that the Government paid her while she was off sick, being operated upon, that sort of thing, may not be deducted from the damages you allow her, if you allow her any; the defendant can't take advantage of that. She is entitled to that as well as the defendants. In other [297] words, if you find that she is entitled to recover at all, she is entitled to recover any damages.

Well, ladies and gentlemen of the jury, I have now come to the end of my charge, and I suggest

to you that you, ladies and gentlemen, when you retire to the jury room select one of your number as foreman. I am going to hand you two forms of verdict. One form of verdict finds in favor of the plaintiff and assesses the damages in the sum of blank amount. The other one finds in favor of the defendant or defendants in this case. Your foreman should sign whichever of those verdicts you may arrive at. I instructed the Clerk to put Mr. DeGolia's wife on this verdict, two defendants, E. B. DeGolia and wife—the two Latin words on the verdicts means “and wife.” It is a way lawyers sometimes show their erudition. I was showing off a little to the Clerk this morning; he hadn't heard about that one.

Ladies and gentlemen of the jury, in order to arrive at a verdict you all have to agree upon it. In this court the verdict must be unanimous. I don't mean to suggest that you may not disagree, if that be the state of your mind, but I do suggest that in order to return a verdict either way there must be unanimous agreement.

Now, counsel, under the rule in the Federal courts you are entitled I believe to take your exceptions to the Court's charge in the presence of this jury before they retire, but out [298] of their hearing. I don't know who wrote that rule—he has never tried a lawsuit—so that requires you gentlemen to come up here and whisper to me while the court reporter comes up to the bench and take it all down. The jury can't hear it, but it must be in your presence and before you retire.

Now, it is my practice to suggest to counsel that the exceptions be taken after the jury retires and out of their presence and that the exceptions may be deemed to have been taken in conformity with the rule.

Mr. Sedgwick: So stipulated, your Honor.

Mr. Melchior: Very well, your Honor.

The Court: There is one further thing, and that is the matter of the exhibits. Sometimes an exhibit that ought to go into the jury room doesn't get in there; sometimes an exhibit that ought not to get in does. The result of that is, after the verdict comes in we have to try the whole lawsuit all over again. Now, I assure you that isn't going to happen.

I make another suggestion to you, counsel, and that suggestion is that you folks, counsel of the respective parties, get these exhibits together and in order and then stipulate your agreement that they are in order and may go in and hand them to the officer, to the court reporter, so that we have a record that this obligation is upon you and it is your responsibility, and that if you fail in it nobody is going to get a new trial.

Now, thank you very much, ladies and gentlemen of the jury. [299] I want an officer sworn here and then I'll have a marshal take you folks to lunch—I see it is about time to go out—and he will take you out to your lunch. And get them a good luncheon, Mr. Marshal.

(Whereupon the Marshal and Bailiff were sworn by the Clerk.)

The Court: If you ladies and gentlemen of the

jury will go with the Marshal, he will find some convenient place where they serve food. You may be excused.

Now, Mr. Marshal, when you bring them back from lunch just take them into the jury room; you won't need to bring them into the courtroom again.

(Whereupon at 11:50 o'clock a.m. the jury retires from the courtroom.)

(The following proceedings were had out of the hearing of the jury:)

The Court: All right. You folks may take your exceptions to the Court's instructions.

Mr. Melchior: I am very well satisfied with the charge, your Honor, except for one very minor point, which is that I believe you stated to the jury that the defendants were under a duty if they knew of defects to take reasonable steps to give notice. I think they would also have been under a duty to take reasonable steps to correct them, either to correct them or to give notice. [300]

The Court: I think I covered that phase of it. All right.

Mr. Melchior: Yes. And of course, as I stated yesterday, I would have requested the Court to charge along the lines of Laird against Mather, the new California case.

The Court: Well, all right. I don't want to engage in conversation with you about this. I want to give you a full, free opportunity to take what exceptions you wish on the record. I don't ordinarily discuss these exceptions, just give you any record you want.

Mr. Melchior: Very well. It was our request to charge 18, 19 and 20 which covered that matter and I except for the record to your failure to give those requests. Thank you very much, your Honor.

The Court: Thank you.

Mr. Sedgwick: No exceptions, your Honor.

The Court: All right. The court will be in recess.

(During the recess the following proceedings were had:)

Mr. Sedgwick: We stipulate that all the exhibits are in order and may be presented to the jurors, together with the forms of verdict.

Mr. Melchior: As handed to Mr. Magee at this time. That is stipulated. [301]

(Whereupon at 2:05 o'clock p.m. the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman: Your Honor, we have.

The Court: Hand it to the officer, please.

Read it to the jury.

The Clerk: Ladies and gentlemen of the jury, harken unto your verdict as it shall stand recorded. We the jury find in favor of the defendant. Signed "David A. Nicolaides," Foreman.

So say you all?

The Jury: Yes.

The Court: All right, ladies and gentlemen of the jury, you may now be excused from attendance from the court until further notice.

The court will be in recess. [302]

[Endorsed]: Filed April 14, 1959.

[Endorsed]: No. 16455. United States Court of Appeals for the Ninth Circuit. Lucy K. Cohen, Appellant, vs. Western Hotels, Inc., and E. B. DeGolia, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: May 1, 1959.

Docketed: May 4, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16455

LUCY K. COHEN,

Plaintiff and Appellant,

vs.

WESTERN HOTELS, INC., a Corporation, and
E. B. DeGOLIA,

Defendants and Respondents.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Appellant intends to rely in the presentation of her appeal herein upon the points appearing in her "Statement of Points on Which Appellant Intends to Rely", filed in the District Court and contained in the typed record, except that point 5 thereof is amended to read as follows:

"5. That the District Court erred in unduly restricting plaintiff's proofs and the presentation of such proofs by plaintiff's counsel."

Dated: May 1, 1959.

FREED & FREED,
/s/ By KURT W. MELCHIOR,
Attorneys for Plaintiff and
Appellant.

[Endorsed]: Filed May 4, 1959. Paul P. O'Brien,
Clerk.



No. 16,455

United States Court of Appeals
For the Ninth Circuit

LUCY K. COHEN,

Appellant,

vs.

WESTERN HOTELS, INC., and

E. B. DeGOLIA,

Appellees.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

Honorable Willis W. Ritter, District Judge.

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No. 16,455

**United States Court of Appeals
For the Ninth Circuit**

LUCY K. COHEN,

Appellant,

VS.

WESTERN HOTELS, INC., and

E. B. DeGOLIA,

Appellees.

BRIEF FOR APPELLANT.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

Honorable Willis W. Ritter, District Judge.

JURISDICTIONAL STATEMENT.

Appellant brought a diversity action against appellees for damages for personal injuries. The judgment of the District Court in favor of appellees was filed on January 8, 1959. Appellant's motion for a new trial was denied on January 27, 1959. A notice of appeal was filed on February 26, 1959. The jurisdiction of this court is invoked under 28 U.S.C. § 1291.

STATEMENT OF THE CASE.

Appellant, a resident of the District of Columbia, had been an overnight guest at appellees' Maurice Hotel in San Francisco. Attempting to depart for her home on the morning of August 14, 1957, she tripped and fell over the edge of a rug loosely placed on the floor of the hotel lobby. She sustained severe and permanent bodily injuries and other loss and damage.

Appellant charged appellees, owners and operators of the hotel, with negligently permitting the rug to be installed and maintained in a hazardous and unsafe condition. She sought to prove that the rug lacked a proper matting and was not fastened securely to the floor; it would lift off the floor and curl up. With the rug's edges raised, forming ridges or loops, the rug constituted a dangerous hazard to persons walking over it. She claimed that the hotel had notice of these dangerous conditions but permitted them to continue. The defendants denied their negligence and pleaded plaintiff's contributory negligence. The District Court barred the testimony of appellant's expert witness but admitted that of appellees' nonexpert witness on the same issue, improperly permitted appellees to amend their pleading on the last afternoon of the trial, committed other prejudicial error while evidence was being taken, and instructed the jury inadequately and improperly.

Further references to the evidence will be made as necessary during the argument.

The jury found for appellees and the court rendered judgment accordingly.

SPECIFICATION OF ERRORS.

1. The court erroneously rejected the testimony of appellant's expert witness as to the proper way to install the rug in appellees' hotel lobby, and his opinion on the safety and propriety of appellees' installation.

Mr. Shaul P. Yosiph, called as an expert witness by the appellant, was asked:

“Q. Now, I will show you Plaintiff's Exhibits 1, 2, 3 and 4 in evidence and ask you to look at those exhibits and tell the jury whether the condition of the rug in the lobby of the Hotel Maurice, when you examined it, was the same as it is in these pictures.” [R. 65.]

The District Court sustained appellees' objection to the question. [R. 65.] Appellant made an offer of proof, and the court stated its grounds for its ruling:

“Mr. Melchior. The expert, if asked, will testify that he compared those pictures with the lobby at the time he was there and he concludes that the conditions are the same.

The Court. Now, of what interest is that to us whether they are or not?

Mr. Melchior. Well, he did not make his inspection at the time of the accident, he made his inspection recently and he is going to say, he is going to testify as to the unsafeness of the conditions that he found there and——

The Court. Well, I don't think we are going to let him do that. That's a conclusion of your expert, that isn't the subject of expert testimony." [R. 67.]

Appellant argued that under the applicable California law the witness's testimony was admissible. [R. 67-68.] The court rejected the applicability of California law:

"The Court. If you were in the State Court you might persuade me, but you are not. This is a procedural matter here and we follow our own procedure.

Mr. Melchior. I don't think it is a procedural matter, your Honor.

The Court. Sure it is. Admissibility of evidence. [etc.]" [R. 68.]

Appellant made a further offer of proof:

"Mr. Melchior. Well, if the court please, this man would, if he were permitted to testify, make demonstrations here in court as to the type of mat which must be placed under a carpet or rug which is not fixed to the floor. This would be a matter of expert testimony, and we [sic] will testify as an expert that the mat that is placed under this rug, that was under the rug at the time of the accident, is a mat which (58) causes a tendency to slip and which causes the rug to slip." [R. 71.]

This offer was excluded. [R. 72.]

Appellant asked her duly qualified expert witness the following hypothetical question, based on facts in evidence:

“Q. (By Mr. Melchior). Mr. Yosiph, assuming that in a public hotel lobby a rug is laid as shown in Plaintiff’s Exhibit 1, which you held in your hand, and assuming that a mat lies under that rug which extends four to five inches short of the edge of the rug——

* * * *

Q. (By Mr. Melchior). (Continuing). And assuming that a person weighing 150 pounds had walked across that rug carrying baggage in the direction from the pillars which you see in the picture to the door, what would be the effect of those facts upon the way in which the edge of the rug adheres to the floor?”

To this, the court sustained the following objection:

“Mr. Sedgwick. Just a moment, please. Your Honor, please, I sound like a broken record but it is incompetent, irrelevant and immaterial, no proper foundation laid, not the proper subject of expert testimony, calling for the opinion and conclusion of this witness, invading the province of the jury and an improper hypothetical question not based on any proper hypothesis in the evidence in this case.” [R. 92.]

2. The court erroneously admitted the testimony of the defense witness Hoffer regarding the absence of previous accidents, the condition of the rug at the date of trial, and the alleged proper method of installing the rug.

On direct examination of witness Alex F. Hoffer, manager of the Maurice Hotel, by defense counsel, the following questions were asked, and answer was permitted over objection:

“Q. Has anyone else ever fallen and presented a claim as the result of those rugs?

A. In the 15 years I have been there, 12 years the rugs have been laid, never any problem.

Q. What is the condition of the rug at the present time?

Mr. Melchior. I object——

The Witness. It is in good shape.

The Court. Well, the objection is overruled. It's in good shape—of course, the basis of your objection, Mr. Melchior, is that it is not material because it isn't at the time of the accident. Now, I would like the jury to understand the basis of my ruling. The basis of my ruling is that, if [264] that is the same rug and it is now in good shape, the fair inference can be drawn that at the time of the accident it was in good shape.” [R. 183-84.]

The court permitted this non-expert witness to testify on a subject solely of expert testimony:

“A. No, the pad does not come out to the edge of the rug. If they did, it would be all wrong; you have to allow for the drop of your rug to come down, depending upon the thickness [259] of your rug. Why, you got to cut your pad further back so that you allow a contour to it, and depending upon the thickness of your padding—if you use a 40-ounce felt, rubber or other equipment, it has to have a certain spread.” [R. 179.]

Appellant's objection thereto and the court's ruling are as follows:

“Mr. Melchior. I move this answer be stricken on the ground your Honor has ruled for the pur-

poses of this case that the jury themselves are to be the judges of how the rug should be properly laid and is not a matter of expert testimony. Moreover, this gentleman has not been shown to have any particular qualifications.

The Court. He isn't talking about any expert testimony; he is talking about whether there is a space between the edge of the rug and the mat." [R. 179.]

3. The court displayed bias toward appellant's case, as for instance in allowing the following question it permitted to be asked of appellant's witness Marshall:

"Q. (By Mr. Sedgwick). Do you have his telephone number?

A. No, I don't.

Q. Well, let me give it to you. You can call him. He is there any time you want to call him and so is his wife. If you really wanted him you could go down and get him right now. The telephone number is Juno 3-9696. Do you want to make a note of it?"

When appellant's counsel objected, the court told the jury that "we don't tolerate that kind of argument." [R. 107.]

4. The court refused to give the following requests to charge offered by appellant:

"Plaintiff's Proposed Instruction No. 18.

Contributory Negligence—Unanticipated Danger.

Contributory negligence is not imputable to a plaintiff for failing to look out for a danger which she had no reasonable cause to apprehend.

Laird v. T. W. Mather, Inc., 51 A. C. 208 at 216."

"Plaintiff's Proposed Instruction No. 19.

Failure to Observe Obvious Danger.

It is possible that you may find that the rug was in a dangerous condition, but that Mrs. Cohen might have seen the dangerous condition of the rug and thus have avoided the accident by stepping around it. But it does not follow from the fact that she might have seen this condition had she looked, that she was contributively negligent as a matter of law. All of the circumstances must be taken into account by you, and if you find that there was some reasonable excuse for a failure by Mrs. Cohen to observe danger from the rug, her conduct may be excused even though the danger was obvious. It was not necessarily negligent to fail to look for dangers in a hotel or business establishment when the ordinarily prudent person would not in fact expect to find the condition where it is, or where she is likely to have her attention distracted as she approached it.

Laird v. T. W. Mather, Inc., 51 A. C. 208 at 215."

"Plaintiff's Proposed Instruction No. 20.

Contributory Negligence: Assumption That Way Is Clear.

Conceding for the sake of argument that, if Mrs. Cohen had looked down in front of her feet

she might have noticed any dangerous condition of the rug, nevertheless you may find that in the circumstances she was reasonably justified in assuming that her way was unobstructed, and that her failure to see it was not necessarily negligence.

Laird v. T. W. Mather, Inc., 51 A. C. 208 at 216.”

The basis for the refusal was that the court was not going to make its charge “that specific”. [R. 198.]

5. The court erroneously instructed the jury by improper use of the term “insurers”:

“Now, the hotel proprietors, not only these hotel proprietors, but others, folks who serve the public, are not insurers, they don’t insure against injury and they don’t carry [289] that kind of legal responsibility.” [R. 204.]

6. The court erred in permitting appellees to amend their pleading at the conclusion of the trial.

SUMMARY OF ARGUMENT.

The sole issues in this case were these: Was the appellees’ rug improperly and insecurely placed in the hotel lobby, creating a danger to travelers and evidencing negligence on the part of appellees? Was appellant’s fall caused by her own contributory negligence?

Appellant’s every attempt to introduce expert testimony concerning the rug placement was blocked by

the District Court. That court misinterpreted federal law, which permits such testimony, and totally ignored the dictates of Rule 43(a), F.R.C.P., which designates the most liberal law of evidence, state or federal, as controlling. California evidentiary law would have permitted the expert testimony; the court's refusal to apply California law constitutes reversible error.

The paradoxical admission of testimony by appellees' non-expert witness on the propriety of the rug's installation compounds the error of the District Court. The lack of this witness's qualifications so to testify is unquestioned; allowing his testimony only highlights the court's erroneous rulings regarding appellant's expert witness.

Moreover, admission of testimony concerning the absence of previous accidents was error; it is clear that such testimony had no probative value, was irrelevant to the issue of appellees' negligence at the time of appellant's injury, and prejudiced appellant's cause.

The admission of testimony of appellees' witness as to the condition of the rug at the date of trial was error. Such testimony might be relevant where unquestioned conditions of permanency exist, so that a reflection from present condition on a past condition might be drawn. In this case, however, the gravamen of appellant's charge is the temporary nature of the rug installation. There is no permanency to the installation of a rug which is not securely fastened, and traveled upon by great numbers of persons. The

same question, when asked of appellant's witness on direct examination, was excluded.

It was error for the District Court to permit appellees to amend their pleading and change their position on the last day of trial. Appellant was taken by surprise and had no opportunity to refute the new last-minute position of appellees.

The trial court's charge on the crucial issues of negligence and contributory negligence was too general to be meaningful as to the issues raised by the evidence.

The unfortunate choice of words by the District Court, employing the term "insurers" in its instruction to the jury, materially prejudiced appellant. The jury was invited to confuse a lawyer's term of art with their laymen's concept of insurance coverage; receiving this misinformation directly from the court aggravated the harm that flows from insurance considerations in tort suits.

ARGUMENT.

I.

THE COURT ERRED IN EXCLUDING APPELLANT'S EXPERT TESTIMONY.

- a. Rule 43(a), Federal Rules of Civil Procedure, required the court to apply the most liberal rules of evidence, whether state or federal.

To show that the rug over which appellant tripped had been installed and maintained by appellees in an improper and hazardous fashion, appellant sought

to introduce the testimony of the expert witness, Yosiph. All of his pertinent expert testimony, however, was blocked by the District Court without even a cursory inspection of the applicable principles of law, and on a premise so plainly erroneous that at this late date such an error is astounding. The court took the initiative toward preventing the reception of expert testimony, without any objection by appellees and without challenge to the expert's qualifications—the court simply volunteered the ruling that there would be no expert testimony. [R. 67-68.]

Rule 43(a), F.R.C.P., plainly states that evidence admissible in the local state courts shall be admitted in the federal District Courts. The rule reads in part as follows:

“All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs. . . .”

The unanimous holding of all federal cases is that whatever law, state or federal, is most liberal in the reception of evidence is to be applied by the federal courts. For example, the court in *Boerner v. United States*, 117 F.2d 387, 391 (2d Cir. 1949), considered itself “directed by federal rule 43(a) to follow that holding on evidence, whether state or fed-

eral, which most favors admissibility.” See also, *e.g.*, *New York Life Ins. Co. v. Schlatter*, 203 F.2d 184 (5th Cir. 1953), where the court held that the rule which favors the reception of evidence governs, whether state or federal; *Schillie v. Atchison, T. & S. F. Ry.*, 222 F.2d 810 (8th Cir. 1955); *Petroleum Carrier Corp. v. Snyder*, 161 F.2d 323 (5th Cir. 1947); *Pollack v. Metropolitan Life Ins. Co.*, 138 F.2d 123 (3d Cir. 1943).

This court has been equally uniform in its holdings. In *RKO Radio Pictures, Inc., v. Sheridan*, 195 F.2d 167 (9th Cir. 1952), it stated that where California law permitted the admissibility of certain evidence, a federal court was governed by the state rule. In *Batelli v. Kagan and Gaines Co.*, 236 F.2d 167 (9th Cir. 1956), this court held certain depositions admissible, as required by Rule 43(a) where California law authorized their admission. See also, *Potlatch Oil & Refining Co. v. Ohio Oil Co.*, 199 F.2d 766 (9th Cir. 1952); *Southern Pac. Co. v. Libbey*, 199 F.2d 341, 348 (9th Cir. 1952); *State Farm Mut. Auto Ins. Co. v. Porter*, 186 F.2d 834, 840 (9th Cir. 1950); *United States v. Smith*, 117 F.2d 911 (9th Cir. 1941). And see, 5 Moore, Federal Practice, § 43.04 (2d ed. 1951).

The admissibility of expert testimony, like all other questions of evidence, is governed by Rule 43(a). *Olsen v. Realty Hotel Corp.*, 210 F.2d 785 (2d Cir. 1954). Yet, despite the clarity of Rule 43(a)’s language, and the consistent interpretation of that rule by federal courts, the District Court summarily re-

jected its application. The Court said, in barring the expert witness's testimony:

“If you were in the State Court you might persuade me, but you are not. This is a procedural matter here and we follow our own procedure.” [R. 68.]

Elsewhere, discussing the admissibility of evidence, and in the presence of the jury, the court stated to appellant's attorney:

“You are talking about California law, we have our own procedure, hasn't anything to do with the State law. * * * We are not operating a state court of California, I told you last week.” [R. 104.]

Clearly, the lower court ignored the most elementary principles governing the reception of evidence in the federal courts and the express direction of Rule 43(a). We recognize the latitude given to all courts, including California's, in receiving expert testimony, but their action, however wide its latitude, must be based on correct standards of judgment. Yet the standard used by the court below was most palpably wrong. That court in fact foreclosed itself all opportunity for the exercise of proper judicial discretion by ignoring the very subject of its discretion—California law.

- b. Under applicable California law the testimony of appellant's expert witness was relevant and admissible.

The California Code of Civil Procedure, § 1870(9), provides in part:

“... evidence may be given upon a trial of the following facts:

“9. . . . The opinion of a witness . . . on a question of science, art, *or trade*, when he is skilled therein. . . .” [Emphasis added.]

Appellant's witness Yosiph was a properly qualified expert, skilled in his trade. He had been employed in the rug business for three decades, and had delivered many public lectures on his trade. He had lectured in churches, schools and universities, and had twice before testified in court as an expert witness. He manufactured and sold a great variety of rugs and pads. Mr. Yosiph's skill, repute and experience in his trade combined amply to qualify him as an expert. [R. 62-65.]

After the court had ruled that the subject of his testimony required no expert witness [R. 67-68], some belated effort was made by appellees to question the witness's personal qualifications, because he was not “an expert on the coefficient of friction or anything of that kind.” [R. 84.] As the witness said, “I am not a laboratory”; but he could testify on the basis of his ample experience in the trade (Cal. Code of Civil Procedure, § 1870(9); R. 86-87); and the court had already excluded all expert testimony on the safe placement of rugs as a *subject* not deserving expert attention. [R. 67-68.]

Moreover, California decisions reveal that testimony such as Yosiph was prevented from giving, from persons *not* skilled in a “laboratory” sense [R. 86],

has been consistently and readily admitted. California has been most liberal in the admission of expert testimony. Thus, in *Rodela v. So. Cal. Edison Co.*, 148 Cal. App. 2d 708, 307 P. 2d 436 (1957), the court stated: "It is now well settled that in this jurisdiction an expert may express an opinion upon the ultimate issue of the case." The court cited *People v. Martinez*, 38 Cal. 2d 556, 564, 241 P. 2d 224 (1952); *George v. Bekins Van & Storage Co.*, 33 Cal. 2d 834, 843-4, 205 P. 2d 1037, 1044 (1949); *People v. Cole*, 47 Cal. App. 2d 68, 301 P. 2d 894 (1956), all to the same effect. See also *People v. Wilson*, 25 Cal. 2d 341, 349, 153 P. 2d 720 (1944); *People v. King*, 104 Cal. App. 2d 298, 304, 231 P. 2d 156 (1951).

The liberal approach of California courts to expert testimony is clearly expressed in *Manney v. Housing Authority of Richmond*, 79 Cal. App. 2d 453, 180 P. 2d 69, 73 (1947), citing with approval the following language from 7 Wigmore on Evidence, pp. 1-29 (2d ed. 1940):

"The opinions of experts are admitted in matters which are not within the common experience of men so that the general knowledge of a person of skill and experience in the particular field may enable him to form an opinion, where men of common experience would not be able to do so."

While the admission of expert testimony is discretionary with the trial court, yet the California rule is that, where an expert witness "disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury," exclusion of his testimony constituted an abuse of discretion requiring reversal. *Wal-*

dez v. Percy, 35 Cal. App. 2d 485, 492, 96 P. 2d 142 (1939). In our case this rule equally requires reversal, inasmuch as the trial court failed totally to apply the required standard of discretion.

The California courts have uniformly implemented these principles. In *Eger v. May Department Stores*, 120 Cal. App. 2d 554, 558, 261 P. 2d 281 (1953), a witness who had "extensive experience and activities relating to parking lots" was held to be a qualified expert witness who could testify as to his opinion of the proper method of maintaining a parking lot. The court stated: "While ordinary persons have experience in the use of parking areas, that does not include knowledge of the operations needed to clean and maintain these areas." 120 Cal. App. 2d at 558. In *Campbell v. Fong Wan*, 141 P. 2d 43 (1943), expert testimony was admitted regarding the custom and usage of constructing scaffoldings. The court, cognizant of the importance of assisting a jury on a matter not readily within common knowledge, stated: "The testimony was necessary in order for the jury to come to an intelligent conclusion concerning the standard of care required of an ordinary man in constructing a scaffolding." 141 P. 2d at 45. Clearly in California an expert may testify as to the proper method of rug installation and maintenance in a hotel lobby.

The courts of California have held expert testimony admissible on the following points:

How to test a rope for rot. *Silveira v. Iverson*, 128 Cal. 187, 190, 60 Pac. 687 (1900);

How often plumbing fixtures should be inspected. *Wallace v. Speier*, 60 Cal. App. 2d 387, 140 P. 2d 900 (1943);

The correct way to unload a shafting. *Forts v. So. Pac. Co.*, 30 Cal. App. 633, 159 Pac. 215 (1916);

From how far away blood had been spattered. *People v. Carter*, 48 Cal. 2d 737, 312 P. 2d 665;

Whether a streetcar could have stopped in time to avoid a collision. *Howland v. Oakland C. St. Ry. Co.*, 110 Cal. App. 475, 126 Pac. 391 (1912);

The insecurity of a knot. *McLain v. Dahlstrom M. Door Co.*, 19 Cal. App. 475, 126 Pac. 391 (1912);

That a fire was of incendiary origin. *Rodela v. Southern Cal. Edison Co.*, *supra*.

See also the list of cases and subjects in which such evidence was held admissible in *Burch v. Valley Motor Lines, Inc.*, 78 Cal. App. 2d 834, at 840-41, 179 P. 2d 47 (1947).

In the recent case of *Oakes v. Chapman*, 158 Cal. App. 2d 78 (1958), golf professionals were recognized as qualified expert witnesses, and testified as to safe places to stand on a golf course, and what course a golf ball may take in flight. The court explained its reasoning at pp. 83-84:

“It is well settled that the testimony of an expert is admissible when such expert, because of his profession, or his peculiar skill and knowledge in some department of science not common to men in general, *enables him to draw an inference where men in general would be left in doubt.*”
[Emphasis added.]

This precisely describes the thwarted function of Mr. Yosiph's testimony. He was prevented from showing, by testimony and demonstration, that the mat placed under appellees' rug had a marked tendency to slip, causing the rug itself also to slip. He was prevented from showing the jury the type of mat required for a secure rug installation. [R. 71.] Thus, though the jury could have no knowledge of the proper and safe method of rug and mat placement, the court obligated them to decide this issue of negligence solely on surmise, without the essential and informative testimony of a competent expert. And where an expert is competent, the appellate court will not hesitate to reverse and direct the lower court to admit his opinion. *Sowden v. Idaho Quartz Mining Co.*, 55 Cal. 443 (1880).

The only reported case dealing with rug installation experts is very much like the case at bar. In *Ordway v. Hilliard*, 266 App. Div. 1056, 44 N.Y.S. 2d 819 (1943), judgment on a jury verdict for defendants was reversed where the issue was whether a fall was "caused by the negligent condition of a rug in defendant's apartment house." The court reversed because of the lower court's error "*in excluding the testimony of experts called by the plaintiffs to show that the manner of laying the throw rug in the hallway in question was contrary to good and well established practice.*" [Emphasis added.]

The relevance, necessity and admissibility of a rug expert's testimony is as clear in California as it is in New York. Rugs are rugs, and juries know no

more about them in California than in New York. Even if there were doubt about the admissibility of the expert's testimony, Rule 43(a) demands that "the doubt should be resolved in favor of the admissibility of the evidence." *Mourikas v. Vardianos*, 169 F. 2d 53, 59 (4th Cir. 1948).

- c. The testimony of appellant's expert witness was also admissible under federal law.

As has been stated, in the federal courts the most liberal available evidentiary rule governs. Thus, in *Garford Trucking Corp. v. Mann*, 163 F. 2d 71 (1st Cir. 1947), the court held state-of-mind evidence admissible under federal law, and said that even if state law deemed it inadmissible, it would come in under Rule 43(a), since the more liberal evidentiary rule would apply. And in *Peoples Gas Co. of Kentucky v. Fitzgerald*, 188 F. 2d 198, 201 (6th Cir. 1951), the court stated: "Though the Kentucky rule may be otherwise, the federal rule is to be followed, because it is most favorable to the reception of evidence." In that case a service manager of a gas company was allowed to give his opinion as to the cause of an explosion. The court expressed the general federal rule regarding expert testimony:

"... the general rule permits a witness experienced in technical matters and qualified to do so to give his opinion in a matter which is not one of common knowledge, *although it involves an ultimate fact* to be finally decided by the jury." 188 F. 2d at 201. [Emphasis added.]

In *Builders Steel Co. v. C.I.R.*, 179 F. 2d 377, 380 (8th Cir. 1950), the court upheld expert testimony on the value of services, stating, “where the matter under inquiry is properly the subject of expert testimony, it is no objection that the opinion sought to be elicited is upon the issue to be decided.” In *Detroit T. & I. R. Co. v. Banning*, 173 F. 2d 752, 756 (6th Cir. 1949), where a conductor and an engineer were asked as to the normality of a drop switch, they could answer, since they had “years of experience,” and could offer an expert opinion on a matter “which is not one of common knowledge, although it involves an ultimate fact to be finally decided by a jury.” See also *Een v. Consolidated Freightways*, 220 F. 2d 82 (8th Cir. 1955), and cases cited; *New York Life Ins. Co. v. Wolf*, 85 F. 2d 162 (8th Cir. 1936).

In accordance with *federal* law, then, as well, Mr. Yosiph should have been permitted to testify as to the custom and usage in the trade concerning rug installation, and the hazards where deviations from the proper method are encountered. Yet the lower court arbitrarily barred his testimony, despite the rule that “reasonable latitude must be permitted by a trial court to the expert in giving his testimony.” *Larkin v. May Department Stores Co.*, 250 F. 2d 948, 950 (3d Cir. 1958). Since it is this Court’s “right and duty . . . to determine whether in the exercise of the discretion committed to it, the trial court applied the correct legal standards,” *Bratt v. Western Air Lines*, 155 F. 2d 850 (10th Cir. 1946), the lower court’s

ruling, clearly misconceived and erroneous, merits reversal. *Phillips Petroleum Co. v. Payne Oil Corp.*, 146 F. 2d 546, 547 (10th Cir. 1944); *Shipley v. Pittsburgh & L. E. R. Co.*, 83 F. Supp. 722 (W. D. Pa. 1949).

- d. Appellant's witness was properly qualified as an expert, and exclusion of his testimony made impossible the jury's intelligent determination of the issue of negligence.

Clearly, and this the lower court recognized, Mr. Yosiph was qualified as an expert witness in the trade of rug installation. It is well settled that an expert witness need not have extensive formal study or training in a specialized field to so qualify. In *Bratt v. Western Air Lines, supra*, a witness had no formal schooling in the field of airplanes, but did possess 29 years of practical experience. The court admitted his testimony as an expert witness, holding that a "witness may be competent to testify as an expert although his knowledge was acquired through the medium of practical experience rather than scientific study and research." Moreover, an expert has been defined to encompass "one who, by study or practical experience, has acquired a knowledge or skill or understanding of certain facts beyond that of an average man." *Farris v. Interstate Circuit, Inc.*, 116 F. 2d 409, 412 (5th Cir. 1941). See also, *Empire Oil & Refining Co. v. Hoyt*, 112 F. 2d 356, 360 (6th Cir. 1940), where the court stated that experts include "persons possessing special or peculiar knowledge acquired from practical experience." The principle of these cases was at one point recognized by the District Court when

it stated to plaintiff's counsel: "You can ask him [Yosiph] about anything that is a proper subject of an expert examination." [R. 73.]

But the court completely misconstrued the scope of the expert's competence when it refused to advantage the jury of his opinion on the subject of his specialty. That such refusal is grounds for reversal is made clear by *McReynolds v. National Woodworking Co.*, 26 F. 2d 975 (D.C. Cir. 1928). There the lower court refused to admit expert testimony to establish the fact that linoleum was not laid properly on a concrete floor. The appellate court reversed, recognizing the prejudicial effect of this exclusion. In *Ekblom v. G. O. Reed, Inc.*, 71 F. 2d 399 (5th Cir. 1934), the Appellate Court reversed a lower court's rejection of an expert witness's conclusion as to the safe way of handling a boiler.

The District Court here barred expert testimony on whether the rug was safely installed [R. 69], and also barred the expert's response to a hypothetical question based on facts in evidence as calling for the same testimony previously rejected. [R. 91-92.] It barred a response to a hypothetical question, based on facts previously elicited, concerning the safety of the rug installation. Exclusion of this testimony deprived the jury of information and opinion which would have enabled it to evaluate the evidence more competently and intelligently. In *United States Smelting Co. v. Parry*, 166 Fed. 407, 415 (8th Cir. 1909), it was held that though the jury was more or less capable of judging the safety of a scaffold, it was

“quite reasonable to believe that they were not as capable of doing so as a practical brick mason and builder of many years’ experience in the use and construction of scaffolds, and that the opinion of a witness possessed of the special knowledge which is born of such experience was calculated appreciably to aid them in reaching a correct conclusion.”

This principle is directly applicable. A jury cannot be expected to know, of its own day-to-day experience, the safest method of installing rugs in hotel lobbies. They cannot be expected to know the significance of the matting underneath the rug in providing for the safety of persons walking on the rug. Rugs, or matting underneath them, are not objects totally foreign to a juror’s knowledge. However, the correct method of installing an 11x30-foot rug in a hotel lobby is beyond what a jury may reasonably be expected to know without enlightenment.

II.

OTHER ERRONEOUS EVIDENTIARY RULINGS OF THE COURT WERE HIGHLY PREJUDICIAL AND CONSTITUTE REVERSIBLE ERROR.

- a. The court erroneously and inconsistently admitted testimony of appellees’ non-expert witness as to the proper manner of laying a rug, though the testimony of appellant’s expert witness was excluded.

We have seen that the District Court blocked all of appellant’s attempts to introduce expert testimony of the adequacy of the rug installation. Nevertheless,

it permitted appellees' hotel manager, in no way an expert, to testify in detail as to the proper way to lay a rug—the very testimony excluded when offered by appellant's expert. [R. 179.] The inconsistency of the court's rulings makes prejudice manifest. Appellant's expert should have been allowed to testify. He was not. Appellees' non-expert certainly should not have been allowed to give expert testimony, in view of the court's silencing of Mr. Yosiph. Yet appellees' witness *was* so allowed. The refusal to permit Mr. Yosiph's testimony is clearly error, sufficient for reversal. The admission of the hotel manager's testimony, grounds in itself for reversal, only compounds the error.

- b. **The court's admission, over objection, of testimony by appellees' witness as to the absence of previous accidents and the condition of the rug at the date of trial was materially prejudicial error.**

The hotel manager was asked on appellees' direct examination, "What is the condition of the rug at the present time?" to which he answered, "It is in good shape" [R. 183], and, moreover, testified that there had been no previous accidents "as a result of those rugs" [R. 183], despite immediate objection. The court overruled appellant's objection and stated: "Well, the objection is overruled. It's [The rug is] in good shape—of course, the basis of your objection, Mr. Melchior, is that it is not material because it isn't at the time of the accident. Now, I would like the jury to understand the basis of my ruling. The basis of my ruling is that, if that is the same rug and it is now in good shape, the

fair inference can be drawn that at the time of the accident it was in good shape.” [R. 184.]

This position is exactly contrary to that taken by the court during appellant’s case, where the ruling was that “you are not entitled to have the witness say anything at all about what the condition is today [etc.]” [R. 72.]

Testimony regarding present condition and lack of previous accidents is proper only where there are conditions of permanency, such as defects in fixed structures like buildings, machines, sidewalks and streets. It is not admissible where it relates to a temporary condition which can change from day to day. See *Chesapeake & Ohio Ry. Co. v. Newman*, 243 F 2d 804 (6th Cir. 1957). In *Hilleary v. Earle Restaurant, Inc.*, 109 F. Supp. 829 (D.D.C. 1952), evidence of the lack of accidents was admissible only if it concerned conditions immediately before and after the event. As the court below said in regard to appellant’s witness’s proffered testimony:

“Telling us what the conditions are up there today or were yesterday or were at any time, except the morning of the accident is immaterial.” [R. 74.]

The same rule should apply to the respondent too.

California law is even more rigorous than federal law on this point. In *Thompson v. B. F. Goodrich Co.*, 48 Cal. App. 2d 723, 120 P. 2d 693 (1942), to the contention that the trial court erred in excluding evidence that nobody had ever fallen over a platform,

the court said, "Even though it be held in some jurisdictions that such evidence is admissible, the rule has not been adopted in California." 120 P. 2d at 696, citing *Carty v. Boeseke-Dawe Co.*, 2 Cal. App. 646, 84 Pac. 267 (1906), and *Sheehan v. Hammond*, 2 Cal. App. 371, 84 Pac. 340 (1906). See also *Murphy v. Lake County*, 106 Cal. App. 2d 61, 234 P. 2d 712 (1951).

It is evident that in the few instances where evidence of the lack of previous accidents is admissible, there must first be established a fixed or permanent situation. The temporary nature of the rug installation, though, was important to appellant's case. There was nothing fixed or permanent about the rug installation. Appellees' own witnesses bolster appellant's case on this issue. [R. 158, 162, 166, 187.] We are not dealing with a sidewalk, a building, or a machine. What is in issue is a rug which responds to weather conditions, to traverse, to disturbances by the shoes of travelers—and as a consequence changes in condition depending on a variety of stimuli and occurrences. Testimony as to its condition in January, 1959 (the time of trial), when the accident occurred in August, 1957, or the absence of accidents in years prior to or after 1957 was highly improper and could only erroneously reflect on the condition of the carpet at the time of the accident. Significantly, Mr. Yosiph's inspection of the rug prior to trial was for the purpose of evaluating, with the aid of the photographic exhibits, the condition and safety of the carpet installation in August, 1957.

Not only was this harmful and self-serving testimony erroneously admitted; permitting appellees to call the carpet safe while denying appellant any opportunity to testify about it for even her limited purpose is a manifest unfairness which in itself deprived appellant of a fair trial.

III.

THE COURT BELOW ERRED IN PERMITTING APPELLEES TO AMEND THEIR PLEADING NEAR THE CONCLUSION OF THE TRIAL.

Appellees' witness Hoffer testified near the end of the trial that the Maurice Hotel was not owned or operated by appellee Western Hotels, Inc., despite appellees' contrary pleading in their answer. A motion to amend the pleadings was then made by appellees' attorney and granted over objection. [R. 175-176.] Here the appellees late in the trial opened an issue that had been undisputed and uncontested, and in fact admitted. Appellant could not under these circumstances investigate or contest the new and surprising claim of Western Hotels, Inc.

Rule 15(b), F.R.C.P., provides that amendments to conform to the evidence may be granted only with respect to "issues not raised by the pleadings [which] are tried by express or implied consent of the parties." Here there was no consent; there was an objection. Thus it was a clear abuse of discretion to permit Western Hotels to amend its pleading as it

did. See 3 Moore, Federal Practice 15.13 at pp. 847-848 (2d ed. 1948). The answer had justifiably relieved appellant from in any way investigating the affiliation of Western Hotels, Inc., with the Maurice Hotel further. One of the main purposes of pleadings is to limit trial issues so that time, effort and money are not wasted on matters about which there is no dispute. Thus, in *Cheffey v. Pennsylvania R. Co.*, 79 F. Supp. 252 (E.D. Pa. 1948), the court granted a new trial where plaintiff was permitted to amend her pleadings to allege a separate ground for negligence, as she was about to rest her case. The court said:

“Of course, plaintiff can move to amend to conform to the proof offered at the trial. Here, however, defendant objected to the amendment at such a ‘late hour’ in the proceedings, defendant having had no warning or notice that it would be obliged to meet such a question. . . .” *Id.* at 259.

Despite the fact that defendant there “did not press his plea of surprise and request a continuance,” *id.* at 260, the court viewed the amendment to be so prejudicial to defendant’s proper conduct of its case as to warrant a new trial; and the Supreme Court stated in *Mulhall v. Keenan*, 85 U.S. 342, 350 (1873), “if there were surprise, the only remedy for it was a motion for a new trial.” Here there was material prejudice and obvious unfairness in the District Court’s ruling, which did not permit appellant an opportunity to “make preparation to meet the changed situation” *Smith v. White*, 48 F. Supp. 554, 557 (E.D.

Mo. 1942), despite her plea that she “wasn’t prepared to meet this issue”. [R. 176.]

IV.

THE COURT’S CONDUCT DURING THE TRIAL UNFAIRLY PREJUDICED APPELLANT’S CASE.

Appellant established by the witness Marshall that service of process could not be effected on Mr. Lohman, who had photographed certain pictures in evidence. [R. 103-05.] On cross-examination, over objection, appellees’ counsel was permitted to address the following statement to the witness:

“Well, let me give it [Lohman’s telephone number] to you. You can call him. He is there any time you want to call him and so is his wife. If you really wanted him you could go down and get him right now. The telephone number is Juno 3-9696. Do you want to make a note of it?” [R. 107.]

The court overruled plaintiff’s objection to this remarkable “question” and said to her counsel that “we don’t tolerate that sort of argument.” [R. 107.]

Unquestionably, counsel’s testimony was highly improper. It was indefensible for the court not only to permit such testimony, but particularly, to inform appellant’s counsel, in the presence of the jury, that objection to it would not be tolerated.

It can readily be seen that the jury would be heavily influenced in favor of appellees’ counsel who had

clearly won the favor of the court. Appellant realistically had no opportunity to submit her case to an impartial jury. This episode, occurring in connection with a minor point in the trial, is singled out to show that before the jury appellees were consistently given preferred, and wrongfully preferred, treatment over appellant by the trial court. See also, *e.g.*, R. 82, 104-105, 117-119, 121-122, 179-180, 183-184.

In *Quercia v. United States*, 289 U.S. 466 (1933), where the trial judge commented on the credibility of a witness, the Court found prejudicial error and ordered the judgment reversed. The Court pointed out that the "influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' " *Id.* at 470. And in *Sprinkle v. Davis*, 111 F. 2d 925 (4th Cir. 1940), prejudicial error was found where a court instructed counsel to be fair and not attempt to mislead the jury when counsel asked a witness why he had not testified on a certain point at a former trial. Application of the spirit and letter of these cases warrants reversal in this case.

V.

THE TRIAL COURT'S CHARGE WAS TOO GENERAL.

The trial court's charge on negligence covered some 20 lines of the record [R. 204]; the charge on contributory negligence took about seven printed lines [R. 205]; and there were about ten more lines about

appellant's status as an invitee [R. 211]. These portions of the charge are proper as general statements of law, but they did not aid the jury sufficiently in coming to grips with the facts presented by the evidence in the case.

We had requested the court to charge particularly on lack of contributory negligence in the face of unanticipated danger, failure to observe an obvious danger, and the assumption that one's way is clear. [R. 199, 214-215.] These instructions [R. 14-15] were taken nearly verbatim from the very recent case of *Laird v. T. W. Mather, Inc.*, 51 Cal. 2d 210. They were unquestionably correct and related to the evidence, but they were refused because the court would not—and did not—charge anything “that specific” [R. 198].

Appellant had the right to a full charge which dealt with the concrete issues raised by the evidence, rather than to a mere general statement of only the most basic legal propositions. As this court said in reversing a judgment in *Woodworkers Tool Works v. Byrne*, 191 F. 2d 667, 675-676, “The learned trial judge called attention to the pertinent doctrine of inspection but did not charge in terms of the *Escola* case . . . He did not charge the jury as to the conditions under which X-ray examinations would have been justified or required . . . [etc.]” Or see *Southern Pac. Co. v. Guthrie*, 180 F. 2d 295, 301 (C.A. 9th, 1949, op. adh. to, 186 F. 2d 926, cert. den. 341 U.S. 904): “If a judge states the law incorrectly, or refuses to state it at all,

on a point material to the issue, the party aggrieved will be entitled to a new trial.” [Emphasis added.] This is plainly what occurred here. A charge too general in terms, or which does not relate itself to the facts in evidence, is inadequate to inform the jury. See 88 C.J. 2d Trials, §§379b and 386. The court’s overly casual and incomplete charge in this case did not enlighten the jury as to what Mrs. Cohen, passing through the hotel lobby, could take for granted without being contributorily negligent. This was important error.

VI.

THE INSTRUCTIONS ACTIVELY MISLED THE JURY.

Juries react to statements concerning insurance in negligence actions. The law of evidence has responded to such reaction: evidence may not be admitted as to the pecuniary status of defendants. The prejudicial nature of such evidence has been noted by state and federal courts. See *e.g.*, *The Kearney*, 3 F. Supp. 718 (E.D. N.Y. 1933); *Crawford v. Alioto*, 105 Cal. App. 2d 45, 233 P.2d 148 (1951); *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 118 Pac. 700 (1911); *Roche v. Llewellyn Iron Works Co.*, 140 Cal. 563, 74 Pac. 147 (1903). The sensitivity of the jury to matters of insurance in negligence actions requires a court to exercise caution to prevent such issues from coming improperly before the jury. See *Quercia v. United States*, *supra*. Thus certain misleading phraseology of the court in instructing the jury possesses a sig-

nificance and an influence subtly damaging to appellant's case. Specifically, the court charged that the appellees were "not insurers, they don't carry that kind of legal responsibility." [R. 204.] Any lawyer will appreciate that the court, quite correctly, was speaking of the scope of appellees' legal duty, rather than on the question whether they did not carry, or were ever excused from carrying, casualty or liability insurance; and it was for that reason that counsel failed to object. However, the jury had no reason to be familiar with this special lawyers' meaning of "insurers", and could hardly help but be seriously confused and prejudiced by this unfortunate formulation. If references to insurance are to be kept out of casualty litigation, care must be taken to avoid their inadvertent and greatly misleading inclusion in this manner, so that laymen will properly understand the language of lawyers and judges.

CONCLUSION.

This court knows as well as we do that tripping cases are hard cases for plaintiffs to win. Plaintiffs should, however, be entitled to a fair chance at their goal. Here the plaintiff-appellant's opportunity to reach the jury was destroyed by the exclusion of her proper expert testimony, by many inconsistent and improper rulings on evidence in favor of appellees, by the court's unwarranted and belittling rulings and comments during the trial, and by a too limited and

prejudicial charge. So that plaintiff may have a fair trial, it is prayed that the judgment be reversed and a new trial granted.

Dated, October 7, 1959.

Respectfully submitted,

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No. 16,455

United States Court of Appeals
For the Ninth Circuit

LUCY K. COHEN,

Appellant,

VS.

WESTERN HOTELS, INC., and

E. B. DEGOLIA,

Appellees.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

BRIEF FOR APPELLEES.

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FILED

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No. 16,455

**United States Court of Appeals
For the Ninth Circuit**

LUCY K. COHEN,

Appellant,

VS.

WESTERN HOTELS, INC., and

E. B. DEGOLIA,

Appellees.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

On the morning of August 14, 1957, appellant, Mrs. Lucy K. Cohen, who had been an overnight guest at appellee's Maurice Hotel, proceeded, accompanied by her daughter, across the lobby of the hotel toward a taxi waiting for her in front of the hotel. While walking across the lobby, she tripped and fell, injuring her knee.

Appellant contended that she tripped on a rug in the lobby and charged appellee with negligent placement of the rug. Her theory of liability was that

appellee was negligent in maintaining a hazardous and unsafe condition by permitting a wrinkle in the rug. Appellant further contended that she was not contributorily negligent in failing to see the 11 foot by 31 foot rug or by failing to see the wrinkle if any existed.

Appellant presented and qualified an expert witness and sought to introduce his opinion as to proper and safe manner of placing a rug on a floor. This opinion evidence was properly rejected by the court on the ground that the proper manner of placing a rug on a floor was within the knowledge of the average jurymen and hence not a proper subject for expert testimony. Appellee offered no expert or in-expert opinion on the proper way to lay a rug, but rather introduced evidence showing that no wrinkle existed and that appellant was contributorily negligent in failing to see the rug.

When evidence was introduced showing that Western Hotels, Inc., had no interest of any kind in the Maurice Hotel and that the Maurice Hotel was solely owned by appellee, E. B. DeGolia, the court properly permitted an amendment of the pleadings to drop Western Hotels, Inc., as a party defendant. The jury was fully and adequately instructed, and returned a verdict for appellee.

RULINGS OF THE COURT BELOW.

1. The court did not rule that appellant's expert witness was not qualified or that he could not render

an opinion on a proper subject of expert testimony. The ruling was rather that he could not express an an opinion as to the proper and safe way to place a rug on a floor since this was a subject within the knowledge of the ordinary juryman and hence not a proper subject of expert testimony.

Out of hearing of the jury the court discussed the proposed expert opinion extensively with counsel (R. 66-76). At the close of this discussion, the court summarized the ruling, stating:

“The Court. He can testify to what he saw as he saw it at the time and place in question. He can look at these photographs and I don’t see how he is going to help you with those and tell us what he sees there . . .” (R. 73-74)

The court further stated:

“The Court. He may be an expert in rug texture, that sort of business, and I am not prohibiting him from testifying about that, but if you want to ask if this is a safe or unsafe situation, I say to you, that is not a proper subject for expert testimony.” (R. 75)

As indicated in this ruling appellant’s expert was permitted to express various opinions on rugs. For example,

“Q. (By Mr. Melchoir) Not this rug, but Chinese rugs in general, how they lie and are are placed on floors.

A. Well, I would use the word ‘experience’ because I have confidence in myself to understand the word ‘experience’. My experience teaches me the rug should have a pad.” (R. 79)

“Q. (By Mr. Melchoir.) Mr. Yosiph, what is a foam rubber pad?

A. There are several kinds of foam rubber. I could tell by the way the term is applied to them. For instance, foam rubber, sponge rubber, solid rubber, and there are some pads are rubberized rubber; they are not 100 per cent rubber, so there are these different types of rubber pads used on the market in my shop as well as any other shop.”

It is apparent that the witness was permitted to testify on general rug weave and rug qualities and that he was only prohibited from stating an opinion as to how to place a rug on a floor.

An objection to a hypothetical question inquiring into the adhesion properties of a rug when a person weighing 150 pounds walks across it was also sustained (R. 92). The basis of this ruling is clear since the witness himself testified that he had no experience with adhesive tests or with adhesive properties of rugs.

“Q. Did you ever make any tests about rugs lying on the floor?

A. Your Honor, may I say just one word in reference to the word ‘test’ and to the word ‘adhesive’? These are two scientific words. I don’t want to be involved in them. Why don’t we talk plain English? Put the pad and put the rug on top of the pad? That is the question to be discussed. Adhesive tests, I am not a laboratory.”

The soundness of this ruling appears to be too clear to be called into question.

Despite the obscuration attempted in appellant's brief, the basic ruling seems plain. The admittedly qualified expert of appellant was not permitted to testify to a matter within the knowledge of the ordinary jurymen.

2. The testimony of Mr. Hoffer, the manager of the Maurice Hotel, was not opinion evidence and was properly admitted.

Mr. Hoffer testified that in the 12 years in which the rug had been on the floor of the lobby of the hotel, there had been no prior accidents. This was proper evidence, but even assuming that there were grounds for objection, no objection was made. Appellant has implied on page 6 of her brief and stated on page 25 of her brief that this evidence of no prior accidents was objected to. It is submitted that this is a plain misstatement of the record. The record states:

“Q. Has anyone else ever fallen and presented a claim as a result of those rugs?

A. In the 15 years I have been, 12 years the rugs have been laid, never any problem.

Q. What is the condition of the rug at the present time?

Mr. Melchoir. I object.

The Witness. It is in good shape.

The Court. Well, the objection is overruled. It's in good shape—of course, the basis of your objection, Mr. Melchoir, is that it is not material because it isn't at the time of the accident. Now, I would like the jury to understand the basis of my ruling. The basis of my ruling is that if that is the same rug and it is in good shape, the fair

inference can be drawn that at the time of the accident it was in good shape.” (R. 183-184.)

It seems apparent that the objection was not to the evidence that there had been no prior accidents, but rather to the testimony as to the condition of the rug. The record further shows that prior to the unobjected to statement by Mr. Hoffer that there had been no prior accidents, the same testimony was elicited from Richard S. Carter, a bellman at the hotel. Mr. Carter testified as follows:

“Q. Have you ever seen anyone or known of anyone falling in the lobby before?

A. No.” (R. 157.)

He further testified:

“Q. Nobody ever fell, did they, as a result of catching their heels until this happened?

A. No, no. Sometimes when there was a little rain or something, it would curl up a little. Why, a time or two I have seen a man walk across it, but I have never seen a woman catch her high heel on it at all.” (R. 166.)

This testimony was admitted without objection.

The basis of the ruling that Mr. Hoffer’s testimony that the rug at the time of the trial was in good condition was well stated by the court and needs no further amplification. It is clearly not a matter of expert testimony. The witness saw the rug and reported to the jury what he saw. It is noted that the court extended to appellant’s witness Yosiph the same opportunity.

“The Court. He can testify to what he saw as he saw it at the time and place in question.” (R. 78.)

Appellant, however, did not see fit to ask her witness what the condition of the rug was at the time he observed it.

Mr. Hoffer did not express an opinion, expert or otherwise, as to the proper way to lay a rug. The question to which Mr. Hoffer responded was simple and called for a direct observation.

“Q. Now, do the pads come out completely out to the edge or side edge of the rug?” (R. 179.)

Mr. Hoffer answered the question, but also digressed and stated *why* he, as manager, had not placed the pad out to the edge of the rug.

“A. No, the pad does not come out to the edge of the rug. If they did, it would be all wrong. You have to allow for the drop of the rug to come down, depending on the thickness of the rug. Why, you’ve got to cut your pad further back so that you will allow a contour to it and depending on the thickness of your padding, if you use a 40 ounce felt rubber, or other equipment, it has to have a certain spread.” (R. 179.)

This was clearly not an expression of expert opinion, nor was it underlined and dignified as expert opinion. It is simply the manager of the hotel stating why he was motivated to place the rug in the way he did. Of course it might be objected that the rug *was* placed

the way it was and that his reasons for doing so are irrelevant. However, this testimony was not objected to on the ground of irrelevancy, but rather on the ground that it was not the proper subject matter of expert testimony. Since Mr. Hoffer was not put forward as an expert on rugs by appellee and was not offering an expert opinion or any kind of an opinion, the objection was clearly without merit. It has long been held that an objection must state the proper grounds.

Appellant, throughout her brief, has repeatedly attempted to mislead the court by an alleged contrast between the admission of the hotel manager's statement as to why he laid the rug the way he did and the rejection of appellant's expert opinion on how to lay a rug and in so doing has attempted to impugn the impartiality of the court below. The record, however, reveals this as a tactic to obscure the plain ruling of the court below that expert opinion on how to lay a rug on a floor is not a proper subject for expert testimony.

3. The court below gave appellant a fair and impartial hearing and assisted appellant in the presentation of her case.

Some of the rulings favoring appellant are indicated in the record on appeal at pages 83, 85, 182, 104. When appellant was unable to elicit testimony from her expert witness, Yosiph, concerning his qualifications, the court came to appellant's assistance and aided her in direct examination (R. 80, R. 124).

The court's mild rebuke to appellant—"We don't tolerate that kind of argument." (R. 107) was amply justified in furtherance of the orderly administration of justice. Appellant had introduced as a witness a process server who testified that he had attempted to locate a photographer who had taken pictures of the hotel lobby and that he had been unable to locate the photographer. Although this testimony appeared to be irrelevant, the court allowed appellant to proceed. On cross-examination, appellee asked the witness if he had the telephone number of the photographer that he had attempted to serve, and, when he replied that he had not, appellee's counsel gave him the phone number. Appellant then stated:

"Mr. Melchoir. There is no proof that counsel has given this witness the right telephone number.

The Court. The objection is overruled. We don't tolerate that sort of argument."

4. The court properly and fully instructed the jury on the elements of negligence and contributory negligence and was fully justified in rejecting the argumentative instructions called for by appellant.

SUMMARY OF ARGUMENT.

The issues on appeal are of course not the negligence of appellee or the contributory negligence of appellant, but rather the propriety of the rulings and instructions of the court below.

The first issue is: Was it an abuse of discretion for the trial court to rule that the proper method of placing a rug on a floor is a matter of common knowledge and hence not a proper subject for expert opinion? Appellant relies heavily on Rule 43(a), Federal Rules of Civil Procedure and dwells upon the court's statement that it was not a state court of California. There seems little doubt that Rule 43(a) is to be taken according to its plain language and that it calls for the law which favors admission. However, law of either jurisdiction rejects the testimony presented by appellant and hence it is both impossible and inconsequential to determine which law should be applied.

The second issue is: whether objections to the admission of evidence not properly made at the time of trial may be raised for the first time on appeal. As previously indicated the objection to testimony concerning the absence of prior accidents which appellant now urges on the court, was not made at the time of trial and the objection to the hotel manager's unsolicited remark as to his purpose in laying the rug the way he did, was not made on the proper ground of irrelevancy.

The purportedly paradoxical admission of testimony by the hotel manager as to why he laid the rug the way he did and the rejection of the opinion of Yosiph as to the safety of the rug is a paradox only to appellant and clearly involve unrelated problems.

The admission of the hotel manager's testimony as to the condition of the rug at the date of the trial

was admittedly objected to, and appellant makes much of the irrelevancy of this testimony on the ground of the impermanency of the rug installation. This position might have merit if the testimony that the rug was in good condition related to whether or not the rug had had wrinkles, which might or might not be permanent, but the gist of the testimony was rather that the rug was in good condition in the sense of not being scarred or worn, hence it would appear reasonable that if it was not scarred or worn at the time of trial, it was also not scarred or worn at the prior time of the accident.

The third issue presented is whether or not it was error for the court to permit appellee to amend his pleading and to dismiss as defendant a party who was shown by the evidence to have no connection with the litigation. Whether or not Western Hotels, Inc., was an additional defendant was of no consequence to appellant in the presentation of her case and is certainly of no consequence now in view of the result. The prejudice to appellant is hard to imagine and is in fact non-existent.

The fourth issue presented is whether or not a court is required to give argumentative instructions submitted by the parties.

The fifth issue presented is whether or not it was proper for the court to use the term "insurers" when the meaning and use of the term was fully and adequately explained.

ARGUMENT.**I. THE OPINION OF YOSIPH ON HOW TO LAY A RUG PROPERLY ON A FLOOR WAS PROPERLY EXCLUDED UNDER EITHER FEDERAL LAW OR CALIFORNIA LAW.**

The recent case of *Duff v. Page*, 249 Fed. 2d 137, decided by this court in 1957 is virtually on all fours with the present litigation. In *Duff*, the opinion of the operator of a towing truck as to the proper manner to remove an automobile and a trailer from a snowbank without placing the wrecker on the highway was held to have been properly rejected. The court stated at page 140:

“Expert testimony is appropriate when the factual issue is one which jurors would not ordinarily be able to determine without technical assistance.”

And further:

“It is for the trial court in the exercise of a sound discretion to determine whether expert testimony is appropriate under the particular circumstances of the case.”

The concurring opinion needs no further emphasis.

A. Under Federal Law the opinion of Yosiph on laying the rug was inadmissible.

Despite appellant's argument to the contrary, it seems apparent that under the federal cases Yosiph's opinion as to the safety of the rug must be considered an opinion relating to facts within the knowledge of an ordinary person and hence inadmissible.

A review of the authorities cited by appellant serves as ample indication of the weakness of her

position. In *Garford Trucking Corporation v. Mann*, 163 Fed. 2d 71 (1st Cir. 1947) cited on page 20 of Appellant's Brief, no expert testimony was introduced or considered in the opinion. In *Peoples Gas Company of Kentucky v. Fitzgerald*, 188 Fed. 2d 198 (6th Cir. 1951) cited on page 20 of Appellant's Brief, appellant stated that the service manager of a gas company was allowed to give his opinion as to the cause of an explosion. This is not a correct reading of the case. The qualifications or identity of the expert witness were not made clear in the opinion and there is no indication that it was Grow, the service manager, who testified. In *Builders Steel Company v. C. I. R.*, 179 Fed. 2d 377 (8th Cir. 1950), page 21 of Appellant's Brief, the case was tried before a court without a jury. In *Detroit T & I. R. Co. v. Banning*, 173 Fed. 2d 752 (6th Cir. 1949), page 21, Appellant's Brief, the expert testimony improperly excluded was the opinion of a conductor and an engineer as to the normal method of switching railroad cars. The court stated at page 756:

“The proper operation of a railroad involves a combination of factors not within the knowledge of the average jurymen.”

The only comment that needs to be made is that everyone owns a rug, not everyone owns a railroad.

In *Een v. Consolidated Freightways*, 220 Fed. 2d 82 (8th Cir. 1955, page 21, Appellant's Brief, the testimony admitted was that of a deputy sheriff who had observed the position of vehicles after collision and was permitted to give his opinion as to the

point of impact. This would admittedly be a holding in favor of appellant's position if it were not for the fact that the court stated that the expert opinion was improper since it concerned a subject within the average man's knowledge, but that the otherwise valid objection was waived by a failure to make a proper objection to the opinion testimony at the time it was offered.

In *New York Life Insurance Company v. Wolf(e)*, 85 Fed. 2d 182 (8th Cir. 1936), page 21, Appellant's Brief, the court actually reversed the verdict below on the ground of the improper *admission* of expert opinion. The suit was on a life insurance policy on which there was an admitted misrepresentation in the application. The defense to the misrepresentation by the plaintiff was that a legible copy of the application was not attached to the policy as required by South Dakota Law. Two doctors, eye, ear and nose specialists, were permitted to testify that in their opinion, a normal person could not read the print in the reduced size photostatic copy. This expert opinion was admitted by the trial court and the 8th Circuit reversed the verdict on the ground that the admission was improper, stating at page 166:

“An obvious appearance of physical fact needs no elucidation by an expert.”

In *Larkin v. May Department Stores*, 250 Fed. 2d 948 (3rd Cir. 1958), page 21, Appellant's Brief, the issue was the propriety of granting an involuntary dismissal. The court reversed, stating at page 116:

“It is well settled law that cases are not to be lightly taken from the jury.”

In *Bratt v. Western Air Lines*, 155 Fed. 2d 850 (10th Cir. 1946), page 21 of Appellant's Brief, the expert testimony improperly excluded was that of an aircraft mechanic whose opinion was offered as to whether the right horizontal stabilizer of the aircraft was the first part to fail in flight. As in the railroad case above, this question was clearly outside of the knowledge of the average juror. The issue in the *Bratt* case was not whether the question was within the knowledge of the average juror, but rather as to the qualifications of the expert. In *Phillips Petroleum Company v. Payne Oil Corporation*, 148 Fed. 2d 546 (10th Cir. 1944), page 22 of Appellant's Brief, expert testimony was presented on both sides that certain expenses were either “drilling expenses or operational expenses” within the meaning of the contract relating to an oil well drilling concern. In *Shipley v. Pittsburg and L.E.R. Company*, 83 Fed. Supp. 722 (W. D. Pa. 1949), page 22, Appellant's Brief, the expert testimony concerned the interpretation of standard working agreements between employees and railroads generally for purposes of interpreting the collective bargaining contract. In *Ferris v. Interstate Circuit, Inc.*, 116 Fed. 2d 409 (5th Cir. 1941), page 22, Appellant's Brief, the action was on a fall by plaintiff in a theatre due to a defective floor condition. The building manager and an architect were permitted to testify for defendant that the theatre and the theatre plans and construction were of a standard design and

were reasonably safe. The court reversed the directed verdict for defendant, stating that the expert testimony was improperly admitted, stating at page 412:

“An expert is not permitted to state his opinion on matters of common knowledge.”

And further, at page 412:

“The opinion they offered concerning the safety of construction invaded the province of the jury and, as the unconflicting testimony and the photographs clearly portray the conditions existing at the scene of the accident, the jury was fully competent to determine the question before it as any architectural or other expert.”

In *Empire Oil & Refining Company v. Hoyt*, 112 Fed. 2d 356 (6th Cir. 1940), page 22 of Appellant's Brief, again the expert testimony was highly technical and clearly outside the knowledge of the average jury. In *McReynolds v. National Woodworking Co.*, 26 Fed. 2d 975 (D.C. Cir. 1929), page 23, Appellant's Brief, the basis of the trial court's exclusion of the expert testimony was that it was substantively irrelevant. The circuit court disagreed as to the elements of the plaintiff's cause of action and reversed on that basis. In *Ekblom v. Reed*, 71 Fed. 2d 399 (5th Cir. 1934) the court reversed a directed verdict on the ground that an opinion as to the proper manner of unloading a boiler was proper and was not within the knowledge of the average jurymen. In *United States Smelting Company v. Perry*, 166 Fed. 407 (8th Cir. 1909) the court affirmed a plaintiff's verdict and the admission of opinion testimony that the normal, safe

method of constructing a scaffold was either by use of a "footlock" or the nailing down of one end of the planking. The court stated at page 411:

"The true test being not the total dependence of the jury on such testimony, but their inability to judge for themselves as well as the witness."

The court further stated, at page 411:

"Reference to the cases will show the extent of this qualification, its application . . . and the discretion of the trial judge in this regard."

It appears clear that the cases cited by Appellant do not support her contention.

Federal cases have long held that expert opinion is not admissible where the jury is as capable of deciding the matter as the expert witness. The leading case of *Milwaukee & St. Paul Railroad v. Kellogg*, 94 U.S. 469, 24 Law. Ed. 256, was decided by the Supreme Court in 1877 and since that time the general rule has been well established. In *Milwaukee* the action was to recover for fire damage to the plaintiff's saw mill allegedly caused by sparks from the defendant's steamboat. The defendant had attempted to introduce the opinion of experienced fire insurance men that the nearness of the lumber to the mill created a fire hazard. The court upheld the rejection of the opinion on the ground that "the subject of proposed inquiry is a matter of common observation" (page 471).

Accord:

Schneider v. Barney, 113 U.S. 645, 28 Law. Ed. 1130 (1885).

The next major Supreme Court case on the issue was *Island and Seaboard Coasting Co. v. Polson*, 139 U.S. 557, 35 Law. Ed. 270 (1891). The court stated at page 656:

“The question whether the place where the plaintiff stood on the wharf was reasonably safe was one of the questions to be determined by the jury depending on common knowledge and observation, and requiring no special training or experience to decide, and upon which therefore no opinions of witnesses were admissible.”

In *Spokane and I.E.R. Co. v. United States*, 241 U.S. 344, 60 Law. Ed. 1037 (1915) the court followed its earlier decisions and upheld the 9th Circuit’s affirmance of the district court’s rejection of the testimony offered by defendant railroad safety engineers to the effect that railroad cars were safe without iron grabholds at the ends of the cars.

In *U. S. v. Spalding*, 293 U.S. 498, 79 Law. Ed. 617 (1934) the essential holding of the court was that expert testimony offered invaded the province of the jury when it encompassed the ultimate issue. The plaintiff’s suit was on a policy of war risk insurance, claiming total disability and doctors were permitted to testify that in their opinion the plaintiff was totally disabled. The Court reversed, stating at page 504:

“The experts ought not to have been allowed to state their conclusions on the whole case.”

Ninth Circuit cases under the *Spalding* doctrine include *U. S. v. Baker*, 73 Fed. 2d 691 (9th Cir. 1934), *U. S. v. Stevens*, 73 Fed. 2d 695 (9th Cir. 1934),

U. S. v. Sullivan, 74 Fed. 2d 799 (9th Cir. 1935), *U. S. v. Harris*, 79 Fed. 2d 341 (9th Cir. 1935), *U. S. v. Triandaplous*, 88 Fed. 2d 957 (9th Cir. 1937).

Walker v. Dante, 58 Fed. 2d 1076 (D. C. 1932) is factually similar to the present case. There the plaintiff tripped and fell over a 1½ inch rise on a sidewalk on the premises of the defendant. Even though a detailed diagram of the premises and the sidewalk was shown to the jury, a civil engineer's opinion was offered to the effect that this was unusual sidewalk construction. A directed verdict for defendant was reversed on other grounds, but the rejection of this expert testimony was upheld on the ground that the jury was as competent to answer the question as the witness. As it was with sidewalks, so it is with rugs. Both are within the common experience of the average jurymen. At page 1077, the court stated:

“It does not require a skilled expert to inform the jury as to when the streets or sidewalks are in a safe or dangerous condition.”

A further District of Columbia case which aptly illustrates the Federal rule is *Kenney v. Washington Properties*, 128 Fed. 2d 612 (D. C. 1942). The plaintiff in *Kenney* allegedly fell out of a window of defendant. Two architects were called, fully qualified as experts, and testified that they had examined decedent's hotel room, the window, the height of the sill, the manner of locking the window, the manner of raising and lowering the window, and that in their opinion this type of window was unusual and unsafe. The trial court struck the testimony, instructed the

jury to disregard it and directed a verdict. The Circuit Court affirmed.

Accord: *Lake v. Shenago F. Co.* 160 Fed. 887 (8th Cir. 1909), *Hunt v. Kyle*, 98 Fed. 49 (7th Cir. 1899), *Henion v. New York, N. H. & H. Railway Company*, 79 Fed. 903 (2nd Cir. 1880). Also accord: *Hinkel v. Varner*, 138 Fed. 2d 935 (D. C. 1943).

In *Giffin v. Ensign*, 234 Fed. 2d 307 (3rd Cir. 1956) the expert opinion of a police officer as to the point of impact of two motor vehicles was excluded by the trial court. The Circuit Court affirmed the exclusion, stating at page 314:

“But since the officer did not see the impact, the exact place of impact was clearly a matter of opinion and further one on which the jury was capable of drawing its own conclusion.”

The basis of all these decisions seems clear. If the opinion of the expert witness is of value to the jury, it should be admitted; but if the facts are available to the jury and if the facts are within the understanding of the ordinary jurymen, the expert opinion is of no value and should be rejected. This is aptly summed up by Wigmore, Volume 7, page 21, 3rd edition:

“But the only true criterion is: on *this subject* can a jury from *this person* receive appreciable help” (Mr. Wigmore’s emphasis).

It is submitted that the above cases will support the proposition that expert opinion on how to place a rug is inadmissible.

B. Under California Law the opinion of Yosiph was inadmissible.

Appellant cites the California Code of Civil Procedure, Section 1870 (9) and numerous California cases to the effect that an expert witness, in order to be properly qualified does not need to be a member of a learned profession and is not required to have an academic background. This is undoubtedly the law in the Federal jurisdiction as well as in California, and has been the law for some considerable time. However, it is apparent that appellant's belaboring of this point does not make it any more relevant to the present case. The issue here is not whether a tradesman can be an expert witness, since appellant's witness was *permitted* to testify as an expert witness (R. 73). The issue is whether or not this admittedly expert and admittedly qualified witness can state an opinion as to the proper way to place a rug on a floor. The cases cited by appellant indicate that this opinion would be no more permitted in California than it would be in the Federal courts.

In *George v. Bekins Van & Storage*, 33 C. 2d 834, 205 P. 2d 1037, page 16, Appellant's Brief, the court presents a clear analysis of the problem. In *George* the Supreme Court upheld the trial court's admission of expert testimony as to the origin of a fire in defendant's warehouse, stating at page 844:

"The possible causes of warehouse fires are sufficiently beyond the common experience of the ordinary judge or juror to justify the admission of expert opinion testimony on that issue."

The court cites several fire cases of which some held the expert testimony on the origin of the fire admissible, while others held the expert testimony as to the origin of the fire inadmissible. The analysis of Justice Traynor is consistent with that of the U. S. Supreme Court in *Milwaukee & St. Paul Railroad v. Kellogg*, supra, which reached the opposite conclusion and excluded the expert opinion there presented on the origin of the fire. The distinction is that it depends on the particular fire and the facts of the particular case. The basic question is whether or not this is a type of fire which is within the knowledge of the ordinary jury. Some fires are and some fires are not; the question is basically a determination of fact.

Rodela v. Southern California Edison Co., 148 C. A. 2d 708, 307 P. 2d 436 (1957), page 16, Appellant's Brief, is a later decision in this same line of cases. The expert opinion there was to the effect that the factory fire was not an electrical fire, but "that the pole was set afire by continuing application of heat", at page 713. The admission seems clear on the ground that this type of fire was outside of the knowledge of the average jurymen.

In *Manney v. Housing Authority of Richmond*, 79 C. A. 2d 453, 180 P. 2d 69 (1947) the trial court's admission of opinion evidence on the origin of the fire was approved. The two lines of decisions were recognized and the decisive issue of the average juror's knowledge was recognized. The court quoted an Ohio decision to the effect that "it must not be supposed that there is any rule of evidence concern-

ing the opinions of witnesses which is peculiar to fences, highways, bridges or steamboats or to any other special subject of investigation. Where the facts concerning their condition cannot be made palpable to jurors so that their means of forming opinions are practically equal to those of the witnesses, opinions of such witnesses may be received, accompanied by facts supporting them as they may be able to place intelligently before the jury." (pages 460-461.) Cases supporting the admission of expert testimony on the origin of fires are collected in 131 A.L.R. at page 1124, column 1, and cases holding the expert testimony inadmissible in column 2 of the same page.

All of the cases cited by appellant support the position that the proper subject matter of opinion testimony is a question of fact which is properly left to the discretion of the trial court. In *People v. Martinez*, 38 C. 2d 556, 241 P. 2d 224 (1952), page 16, Appellant's Brief, the admission of opinion testimony by a psychiatrist that the criminal defendant could "function normally with a 2.35% alcohol content in his blood" was upheld. In *People v. Wilson*, 25 C. 2d 341, 153 P. 2d 720 (1944), opinion testimony of a physician that there was no necessity for performing an abortion was upheld. In *People v. King*, 104 C. A. 2d 298, 231 P. 2d 156 (1951), page 16, Appellant's Brief, similar technical medical testimony was upheld. In *Eger v. May Department Stores*, 120 C. A. 2d 554, 261 P. 2d 281 (1953), page 17, Appellant's Brief, the court affirmed a verdict for defendant and affirmed the trial court's factual conclusion that ex-

pert testimony as to the maintenance of parking lots should be permitted on the ground that it is not within the experience of ordinary persons. In *Campbell v. Wong Fon*, 141 P. 2d 43 (1943), the court affirmed the judgment for the plaintiff and affirmed the trial court's factual decision that the proper method of constructing and using a scaffolding was not within the knowledge of the ordinary jurymen. All of these California decisions find close analogies in the federal jurisdiction. The rule is fundamentally the same in both: the trial court must determine under the facts of the particular case whether or not the expert testimony is within the knowledge of the average jurymen.

In *Wallace v. Speier*, 60 C. A. 2d 385, 104 P. 2d 900 (1943), page 18, Appellant's Brief, the court upheld the admission of a plumber's testimony on the proper way of maintaining plumbing fixtures. The court at page 395 quoted an earlier Supreme Court decision to the effect that:

"This is a question largely for the determination of the trial judge and his ruling will not be disturbed unless error clearly appears."

In *Fonts v. Southern Pacific Co.*, 30 C. A. 633, 159 P. 215 (1916) the court again affirmed the factual determination of the trial judge that the proper method of unloading a heavy shafting was not within the knowledge of the average juror. In *People v. Carter*, 48 C. 2d 733, 312 P. 2d 665, page 18, Appellant's Brief, the court approved the admission by the trial

court of testimony of a medical doctor that he had conducted experiments of blood dynamics and had formed an opinion as to how blood had spattered from the murder victim. In *McLain v. Dahlstrom Door Co.*, 19 C. A. 475, 126 P. 391 (1912), page 18, Appellant's Brief, the trial court's factual determination that the proper kind of knot to be used on an elevator was not within the knowledge of the average jurymen. In *Burch v. Valley Motor Lines, Inc.*, 78 C. A. 2d 834, 179 P. 2d 47 (1947), page 18, Appellant's Brief, the court held that the opinion testimony of an associate professor of mechanical engineering should have been admitted as to the cause of a metal bar distorting and shearing.

In *Oakes v. Chapman*, 158 C. A. 2d 78 (1958), page 18, Appellant's Brief, the First District Court of Appeal in a well-reasoned decision, upheld the trial court's admission of expert testimony as to the consequences of hitting a golf ball. The court stated at page 82:

"In close situations the admissibility of expert testimony is frequently a matter in the discretion of a trial court."

and further quoting an earlier Supreme Court decision:

"It is for the trial court to determine in the exercise of a sound discretion the competency and qualification of an expert witness to give his opinion in evidence, and its ruling will not be disturbed upon appeal unless a manifest abuse of that discretion is shown."

As it is in California and in the Federal courts, so it is in every jurisdiction: the factual determination of whether the subject matter of expert opinion is within the knowledge of a juror is properly left to the trial court, and a verdict rendered upon the evidence so rejected or accepted will not be reversed on appeal. On Page 19 of her brief, appellant cites a New York case and states that this is a reversal of a jury verdict. It does not appear in the Per Curiam report whether the judgment was the result of a jury verdict or a directed verdict on insufficient evidence. The opinion, however, reads as if the reversal were based on a directed verdict of nonsuit below. At page 19 the New York court stated:

“There was evidence from which the jury could have found that the throw rug was in a defective condition.”

and further

“On the whole case the question of the defendant’s negligence and the plaintiff’s freedom from contributory negligence was for the jury.”

Apparently the court was reversing a directed verdict.

A recent First District decision upholding the rejection of proffered expert testimony is *Baccus v. Kroger*, 120 C. A. 2d 802, 262 P. 2d 349 (1953). In *Baccus* a structural engineer was qualified as an expert and permitted to testify that the sidewalk was in a dangerous condition. Although the verdict for plaintiff was affirmed the court disapproved the admission of this expert testimony, stating at page 804:

“Obviously, whether the sidewalk was in a safe condition for pedestrian use was a question for the jury and not for an engineer.”

Wilkerson v. City of El Monte, 17 C. A. 2d 615, 62 P. 2d 790, is in accord on the particular factual determination of the safety of city streets. The condition of a sidewalk seems quite analogous to that of a rug, but in any event it appears obvious that this determination is properly left to the trial court.

Blinkinsop v. Webber, 85 C.A. 2d 276, 193 P. 2d 96 (1948) is in accord in the exclusion of expert testimony of a civil engineer as to whether apartment house steps were safe. *McStay v. Citizens National Bank*, 5 C.A. 2d 595, 43 P. 2d 560 (1935) is in accord in disapproving the admission of an expert opinion as to the safety of hotel steps.

It appears that in California there is no authority contrary to the proposition that an expert witness may not testify as to matters within the knowledge of the ordinary juryman and that the determination of whether or not the proposed opinion is within this scope of knowledge is properly left to the sound discretion of the trial court.

II. OBJECTIONS TO THE ADMISSION OF EVIDENCE NOT PROPERLY MADE AT THE TIME OF TRIAL MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL.

- A. The testimony as to the absence of previous accidents by appellee's witnesses Carter and Hoffer was not objected to and is hence clearly admissible.

As indicated above there was no objection to the testimony of either Mr. Carter or Mr. Hoffer that during their years of work in the hotel they had never before had knowledge of a similar accident. It has long been the uniform holding that evidence must be objected to at the time of trial. A recent Eighth Circuit case which aptly summarizes this well established rule is *Een v. Consolidated Freightways*, 220 Fed. 2d 82 (1955). The court stated at page 88:

"It is essential to a review of the ruling on the admissibility of evidence that a specific objection be made in the trial court sharply calling the ground relied upon to the attention of the court and on appeal the objection interposed must be relied upon."

Accord: *Southern Pacific Company v. McCready* (9th Cir. 1931), 47 Fed. 2d 673; *U. S. v. Nickle* (8th Cir.), 70 Fed. 2d 873; *Cockerell v. U. S.* (8th Cir.) 74 Fed. 2d 151; *Oslund v. State Farm Auto Ins. Co.* (9th Cir. 1957), 242 Fed. 2d 816; *Metropolitan Life Ins. Co. v. Armstrong*, 85 Fed. 2d 187 (8th Cir.); Simpkins Federal Practice, 3rd Edition, Section 581; *Noonan v. Caledonia Gold Mining Co.*, 171 U. S. 393, 7 S. Ct. 911 (1887). This principle appears too clearly established for further discussion.

The narrow exception to this rule is the "plain error" doctrine. However, there is no "plain error"

in the present situation since the evidence would have been admissible even if objected to. In *Chicago, Rock Island and Pacific Railway Co. v. Lint* (8th Cir. 1954), 217 Fed. 2d 279, the court stated at page 283:

“Defendant has introduced uncontroverted evidence that for many years it used the same type of hinge similarly installed at all its yards and that farm gates in the territory are generally so equipped and that there has been no **previous** accident such as happened here. Such evidence is admissible and is very persuasive. . . .”

Accord: *Chesapeake and Ohio Railroad v. Newman*, 243 Fed. 2d 804 (6th Cir. 1957); *Farris v. Interstate Circuit, Inc.*, 116 Fed. 2d 402 (5th Cir. 1941), at page 411; *Hilleary v. Earle Restaurant, Inc.*, 109 Fed. Supp. 829 (D. C. 1952); *Martucci v. Brooklyn Children's Aid Assn.*, 140 Fed. 2d 732 (2nd Cir. 1944).

B. The testimony of appellee's witness Hoffer was not objected to on the proper ground of irrelevancy and cannot now be objected to on appeal.

It is apparent from the record as indicated above that appellant's objection at the time of trial that Mr. Hoffer's testimony was expert opinion was clearly without merit since Mr. Hoffer was explaining why he laid the rug the way he did and not expressing an opinion of any kind. It is possible that an objection might be raised as to the relevancy of this testimony, but as indicated in the *Een* case, *supra*, and the numerous other cases cited under *Een*, the proper grounds of objection must be stated. It is further submitted that the proper determination of relevancy

should be left within the sound discretion of the trial court. The relevancy of trivial fragments of evidence presented at trial is not within the proper scope of review of an appellate court.

III. APPELLEE WAS PROPERLY PERMITTED TO AMEND HIS PLEADING TO CONFORM TO THE EVIDENCE.

When evidence was introduced to the effect that Western Hotels, Inc., was unconnected in any way with appellee E. B. DeGolia or with the Hotel Maurice, the court properly permitted appellee to amend the pleadings to conform to the evidence.

Federal Rules of Civil Procedure, Rule 15(b) states:

“Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. But failure to so amend does not affect the result of trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.”

It is obvious that appellant was not prejudiced in any way by the amendment of the pleadings to elimi-

nate Western Hotels, Inc., as a defendant. All the elements of their cause of action were the same, whether or not there was an additional defendant. E. B. DeGolia, is, of course, solvent, and able to satisfy any judgment without reference to any other party. In any event Western Hotels, Inc., is an unrelated party and could not be held liable whether the pleadings were amended or not. Furthermore, in view of the verdict, it would not matter whether there had been one or twenty defendants.

Furthermore, appellant did not object to the amendment of the pleadings (R. 177).

IV. THE INSTRUCTIONS OF THE COURT WERE ADEQUATE AND PROPER.

A. The court was not required to give argumentative instructions submitted by the parties.

A reading of the court's instructions will support their clarity and completeness without further argument. Appellant states that the charge on contributory negligence was confined to seven lines. It is, of course, obvious that the length of an instruction is not the point but rather the clarity and completeness of expression. However, the length of the contributory negligence instruction does appear misstated by appellant. There are three lines relative to contributory negligence at page 203 of the record, sixteen lines on contributory negligence at page 205, and ten lines on contributory negligence on page 206.

In their request for instructions, appellant cited *Laird v. Mather*, 51 Cal. 2d 210 (1959) (Page 31, Appellant's Brief) and demanded that dicta from the case be placed in the instruction. Requested instruction No. 18 might possibly be related to the *Laird* case. However, the other two instructions may only be very questionably derived from it. In any event, it seems plain that the case does not stand for the proposition that attorneys in State or Federal Court may insist upon argumentative instructions slanted in favor of their client.

The modern trend is clearly away from argumentative instructions, and it is doubtful if any modern case in any jurisdiction would support appellant's view. The general position of the California courts is summed up in 1 B.A.J.I. at page 4:

“Although to thus instruct a jury and to do so clearly may require the assuming of possible findings of fact or the statement of hypothetical situations, it does not require for either side argumentative instructions dealing with specific details of evidence.”

Southern Pacific Co. v. Guthrie, 180 Fed. 2d 295 (9th Cir. 1949) appears directly in point. There the court quoted the Supreme Court at page 301, as follows:

“Perhaps some of the abstract propositions of defendant's counsel contained in the instructions asked for based on the facts assumed therein if such facts were conceded or found in a special verdict would be technically correct, but a judge

is not bound to charge upon assumed facts in the *ipsissima verba* of counsel nor to give categorical answers to juridicial catechism based on such assumption.”

B. The court's use of the term “insurers” in the instruction was not improper.

Appellant contends that the court's use of the term “insurers” in the instruction insidiously implied that appellees were not insured and that this is a reference to the financial ability of one appellee. It is clear, however, if the instruction is read in its entirety, that the court fully and adequately explained what he meant by the term “insurers” and that its use did not carry the connotation that appellant is seeking to force into it. The court stated (R. 204):

“Now the hotel proprietors, not only these hotel proprietors but others, folks that serve the public, are not insurers. They don't insure against injury and they don't carry that kind of legal responsibility. Mr. DeGolia and his wife, the defendants here, are going to be responsible and only, ladies and gentlemen of the jury, if they were negligent in their care and maintenance of the carpet in question at the time and place of this injury.”

It would appear that this is a full and adequate instruction and aptly and in common language explains the duty of appellees.

In *Chicago, Rock Island and Pacific Railroad Company v. Lent*, 217 Fed. 2d 179 (8th Cir. 1954), the court expressly approved a proposed instruction that

used the word insurer and explained that the liability of defendant was not absolute. The instruction that was approved at page 284 contains the phrase, "This does not mean that defendant was an insurer against all mishaps that might occur nor that the properties where plaintiff would discharge his duties had to be maintained in a perfect condition." Accord: *Chicago St.P.M.M.&O. Railroad Company v. Arnold*, 160 Fed. 2d 1002 (8th Cir.).

Appellant states on the final page of her brief:

"If references to insurance are to be kept out of casualty litigation care must be taken to avoid the inadvertent and greatly misleading inclusion in this manner so that laymen will properly understand the language of lawyers and judges."

This pious admonition appears ludicrous in light of appellant's blatant attempt to introduce the issue of insurance in her voir dire examination (Plaintiffs' Juror's Question No. 5, Record page 12).

CONCLUSION.

Under our system of justice even plaintiffs with doubtful cases are entitled to their day in court. Appellant here has had her day and yet she seeks to thrust upon this court a second factual determination of the issues which were resolved against her by the court and the jury below. Three days were spent in presenting evidence for the consideration of the jury. The learned trial judge properly excluded and admitted evidence, and carefully instructed the jury.

Appellant seeks now to overturn the carefully considered and obviously correct judgment against her, and to convert the Circuit Court into an arena for the retrial of factual issues.

Dated, San Francisco, California,
November 18, 1959.

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No. 16,455

United States Court of Appeals
For the Ninth Circuit

LUCY K. COHEN,

Appellant,

VS.

WESTERN HOTELS, INC., and

E. B. DEGOLIA,

Appellees.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S REPLY BRIEF.

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No. 16,455

**United States Court of Appeals
For the Ninth Circuit**

LUCY K. COHEN,

vs.

WESTERN HOTELS, INC., and
E. B. DEGOLIA,

Appellant,

Appellees.

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

APPELLANT'S REPLY BRIEF.

I.

Two points made in appellant's opening brief have not been answered by appellees and appear conceded:

A. That it was improper to permit appellees' witness Hoffer to testify that at the time of trial the rug was "in good shape" [R. 183]. It will be recalled that our expert witness, when asked a similar question for a proper purpose, was not allowed to answer. At that time the trial judge stated that appellant was "not entitled to have the witness say anything at all

about what the condition is today” [R. 72]. However, our objection to appellees’ like question on direct examination of their own witness was overruled. The trial judge followed this ruling with a highly prejudicial speech to the jury, in which he said:

“Now, I would like the jury to understand the basis of my ruling. The basis of my ruling is that, if that is the same rug and it is now in good shape, the fair inference can be drawn that at the time of the accident it was in good shape” [R. 184].

Compare this with the court’s statement to appellant’s counsel about the same question asked of her witness:

“... if you are going to ask him to say that was a terribly dangerous situation or a dangerous situation, I am not going to let you do that . . . Telling us what the conditions are up there today or were yesterday or were at any time, except the morning of the accident, is immaterial” [R. 74].

The material prejudice to appellant from this inconsistency, acutely compounded by the trial judge’s quoted remarks to the jury, is apparent. See our opening brief at pages 25-28.

B. That the trial judge engaged in conduct highly prejudicial to appellant’s case. One instance of such conduct has just been quoted. Others have been set forth in our opening brief at pages 30-31. About all that appellees have to say about the matter is that they found four rulings on objections in appel-

lant's favor (Appellees' Br. 8) and that a particular rebuke by the court to appellant's counsel, discussed in our opening brief, was "mild" (Appellees' Br. 9). There was nothing mild about it. Appellant had made a thoroughly valid objection to a highly inflammatory statement by appellees' counsel, and for this her attorney was reprimanded by the judge in the presence of the jury: "we don't tolerate that kind of argument" [R. 107]. A full reading of the record will make it apparent that the trial judge did in fact interfere frequently in a belittling and deprecating way with appellant's case.

II.

Appellees are wrong when they state (Br. 31) that we failed to object to the amendment of their pleadings just before the end of the trial. Our objection was plain and clear: We had no time to prepare to meet the new issue [R. 176, 200].

The only other comment which appellees make on this point is that "appellant was not prejudiced in any way by the amendment." They state in their brief (p. 31) that the defendant DeGolia "is, of course, solvent"—a matter not reflected by the record. As a matter of fact, appellees' counsel argued at length to the jury about the unfairness of prosecuting this case against helpless Mr. DeGolia, confined for many years in a hospital [R. 175]. This particular departure into obscurantism would not have been possible if Western Hotels, Inc. had been kept in the case.

III.

In our opening brief we claimed prejudicial error in the trial judge's failure to strike volunteered testimony of appellees' witness Hoffer (not an expert) on how a rug such as the one in suit should properly be laid on the floor [R. 179]. The same type of question was repeatedly excluded when appellant asked it of her expert [e.g., R. 91]. The inconsistent rulings are, of course, severely prejudicial.

Appellees' answer is that Hoffer's testimony was not expert testimony, *i.e.*, opinion testimony, but was merely irrelevant; they say that appellant made the wrong objection.

It is apparent, however, that Hoffer testified in detail as to why and how a rug should properly be placed as this one was, *i.e.*, what would be the consequences of laying the rug in this fashion or in some other fashion. This is precisely the question of "how the rug should be properly laid" [objection, R. 179], which was the main subject of the court's ruling against admission of expert testimony during appellant's case [R. 71, 73, 91-92]. Contrary to appellees' position, the vice in the volunteered answer was that it called for an opinion as to whether and why the rug was properly placed. This was no problem of relevance. Appellees were permitted to develop their theory of proper rug installation, while appellant was precluded from showing why or how the rug placement was improper.

IV.

On the question whether appellant was erroneously precluded from introducing expert testimony, appellees devote the bulk of their brief to distinguishing some of our cases on the basis that they involved appeals in bench trials, from nonsuits, in cases where the admission rather than the exclusion of expert testimony was under attack, and the like. We had thought that the governing rule of law as to admissibility of expert testimony was the same in all such cases, and in a jury trial as well. The basic rules seem fairly clear, and both sides appear to be in agreement on them:

(1) “It is for the trial court *in the exercise of a sound discretion* to determine whether expert testimony is appropriate under the particular circumstances of the case,” *Duff v. Page*, 249 F. 2d 137, 140; Appellees’ Br. 12 (emphasis supplied). See also *Oakes v. Chapman*, 158 Cal. App. 2d 78, 82 (1958); Appellees’ Br. 25; App. Br. 18.

(2) But the discretion of the trial judge *must* be exercised according to “*correct legal standards*”. *Bratt v. Western Airlines*, 155 F. 2d 850 (10th Cir. 1946) (emphasis supplied). It is for the appellate court to determine whether the correct legal standards governed the trial judge’s use of his discretion, *ibid.* And in proper cases the application of the wrong legal standard requires reversal. See App. Br. 21-22 and compare Appellees’ Br. 15.

(3) It is not a sound objection that the witness may express an opinion on the ultimate issue in the case if that issue is such that expert testimony can enlighten the jurors (see Appellees' Br. 20; App. Br. 20-21).

(4) Readily observable matters within the understanding of the ordinary juryman are not subjects for expert testimony (Appellees' Br. 20).

(5) If the evidence, expert or otherwise, is admissible either under California State law or under Federal law, it is the duty of the trial judge to admit it, and error to exclude it. (Rule 43(a), F.R.C.P.; Appellees' Br. 10; App. Br. 12-14.)

The foregoing rules cover the subject and are not disputed between the parties. The question remains:

Did the judge correctly apply a proper legal standard in excluding appellant's expert testimony?

We submit that appellees' brief does not come to grips with this question. It is a recital of other situations in which expert testimony has or has not been admitted, but there is no analysis of what these cases mean to the present issue. But each case stands on its own facts; the only rug case found by either party stands for the proposition that the placement of rugs is a proper subject for expert testimony because it is not within the experience of the ordinary juryman. Failure to permit an expert to testify on the placement of rugs was there held to be reversible error. *Ordway v. Hilliard*, 266 App. Div. 1056, 44

N.Y.S. 2d 819 (1943). The bulk of appellees' cases are sidewalk cases, and we submit that they are not pertinent. There is a great difference between a permanent sidewalk made of concrete, which either has some noticeable defect or does not, and a large rug (this one was 11' x 31' [R. 178]) loosely placed across the floor of a hotel lobby, where countless people pass through and where the proprietor owes a special duty of care to his business invitees. *Laird v. T. W. Mather, Inc.*, 51 Cal. 2d 210 (1958). The special considerations of safety involved in the placement of a movable, loosely installed floor covering in such a public business place have no relation to the placement of rugs in a home, for instance, which would be the limit of the average jurymen's familiarity with this kind of situation. The public has no such experience with providing a proper floor covering for a hotel lobby as it has with rises and falls in sidewalks.

Appellees' brief is noticeably weak on the trial court's principal error on the question of expert testimony: They state at length that there are Federal cases in which expert testimony has been excluded rather stringently, and to prove their point they analyze cases decided in 1877, 1891, 1915 and 1934 (Appellees' Br. 17, 18). Ignoring the expanding pattern of the law since 1877 and 1934, appellees make only a minimum argument that, under *California* standards of admissibility, the trial judge's ruling was correct. Apart from a discussion of general principles, appellees deal only very briefly with alleged California rulings excluding expert testimony (Appellees' Br. 26-

27), and these cases do not stand for appellees' propositions: In *Baccus v. Kroger*, 120 Cal. App. 2d 802 (1953), a permanent sidewalk installation was involved. The appellate court stated that experts were not needed in this case because "The dangerous condition sticks out like a sore thumb" (p. 804). In *Blinkinsop v. Weber*, 85 C.A. 2d 276 (1948), the opinion states (p. 283): "The opinion of the witness as to whether the steps were built in accordance with standard and accepted construction and architectural practice should have been received." In *McStay v. Citizens National T. & S. Bank*, 5 C.A. 2d 595 (1935), the court stated (p. 601) that the experts should be allowed to testify about "not only the facts but the conclusions to which they lead" because "[t]he scientific or customary construction of the steps or stairways in hotel buildings was not a matter within common knowledge".

Accordingly, appellees' attempt to show that the expert testimony would not have been admissible under California law has actually succeeded in showing the opposite—there is little doubt that under California law the evidence would have been received. The trial judge, in effect, concurred when he stated [R. 68]:

"If you were in a State court, you might persuade me, but you are not."

It is astounding that at this late date an experienced United States District Judge should *refuse to consider* whether evidence is admissible under the State law of the forum, even though his attention was

specifically and explicitly drawn to the provisions of Rule 43(a), F.R.C.P. [see R. 68, 69]. Notably, appellees' brief in effect concedes that the trial judge was in error as a matter of law in not considering the problem in the light of the California rule (Appellees' Br. 10). This seems to be exactly the situation where the trial judge's discretion should be reviewed and the case reversed because of his failure to apply correct legal standards to it. *Bratt v. Western Airlines, supra*.

If appellant had merely shown that she had fallen on the rug, she would, of course, not be entitled to recover. She had to show some negligent conduct on the part of appellees, and she attempted to show two elements of negligence: appellees' knowledge of the rug's tendency to slip, without sufficient corrective action [R. 46-47], and incorrect installation in such a way that a tendency to slippage would result [R. 71].

The latter point is not a subject on which laymen would have any competent knowledge at all, and obviously no testimony other than expert testimony would ever be available to lay a foundation for submitting this theory of negligence to the jury.

When the trial court excluded appellant's expert testimony, it left her claim of negligent installation without any evidentiary support. At the conclusion of the case, all the jury really knew was that the rug had long had some tendency to slip and bunch up [R. 46-47]. As to whether there was something careless or negligent in the way this rug was laid, so as

to generate that tendency to slip, the jury were not enlightened. Would the members of this court, or any other laymen, have any meaningful knowledge on why some large rugs in public places tend to slip while others do not? We submit that only through the help of expert testimony could this part of the case, a very real part of it, be understood by lay persons on the jury.

V.

We urge again that the charge given the jury was inadequate. Appellees' brief talks of "argumentative instructions", of "ipsissima verba", and of "juridical catechism" (pp. 32, 33). We asked for nothing of this sort. It is the law of California where this accident occurred, that pedestrians do not have to look out for unanticipated danger, that even failure to observe an obvious danger may be excused, and that it is not contributory negligence to assume that one's way is clear. *E.g., Laird v. T. W. Mather, Inc.* 51 C. 2d 210 (1958). Since appellees raised the issue of appellant's contributory negligence, the jury certainly should have been instructed that her failure to notice the snare in the edge of the rug, or her failure to be on the lookout for it, could not be contributory negligence on Mrs. Cohen's part. There is nothing argumentative or hypothetical about this: It was a very real factor in the case.

CONCLUSION.

We submit that the appellant has not had a fair trial and is still entitled to one. For that purpose, the judgment should be reversed and a new trial ordered.

Dated, December 28, 1959.

Respectfully submitted,

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No. 16457 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT JOHNSON and DONA JOHNSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 16457

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT JOHNSON and DONA JOHNSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

A jury found appellants guilty on three counts of a four-count Indictment on March 13, 1958, after trial in the United States District Court for the Southern District of California [C. Tr.* 22-23; Tr.** 334-339]. Count One charged that Robert Johnson transferred 690 grains of marijuana to Adrienne Simmrin on or about November 14, 1957, in violation of 26 U. S. C., Sec. 4742(a). Count Two charged that Dona Johnson transferred two ounces, 156 grains of marijuana to Adrienne Simmrin on or about November 26, 1957, in violation of 26 U. S. C., Sec. 4742(a). The Court granted a motion for judgment of acquittal on this count [C. Tr. 22-23]. Count Three charged that Robert and Dona Johnson concealed two ounces, 223 grains of marijuana on or about

*C. Tr. refers to the Clerk's Transcript of Record.

**Tr. refers to the Reporter's Transcript of the trial on March 11, 12 and 13 and April 7, 1958.

November 26, 1957, in violation of 21 U. S. C., Sec. 176(a). Count Four charged that Robert Johnson concealed 36 grains of marijuana on or about November 26, 1957, in violation of 21 U. S. C., Sec. 176(a) [C. Tr. 2-3]. On April 7, 1958, the Court sentenced Robert Johnson to ten years on each of Counts One, Three and Four, to run concurrently; the Court sentenced Dona Johnson to five years on Count Three [C. Tr. 30-32]. The District Court had jurisdiction under 18 U. S. C., Sec. 3231. Appellants filed notice of appeal within the time provided by law [C. Tr. 37]. This Court has jurisdiction under 28 U. S. C., Sec. 1291.

Statement of Facts.

Two persons named Marks and Berger were arrested for the sale and possession of marijuana on September 12, 1957. They told Federal Narcotics Agents Katz and Lang that their source of supply was Robert Johnson, whom they described as white, male American, blond hair, early twenties, six feet tall, 185 pounds and wearing a goatee [S. Tr.* 60-63].

Robert and Dona Johnson lived in Apartment 3 at 20652 Pacific Coast Highway, Malibu, California [S. Tr. 10, 15, 39; Tr. 240, 257].

On November 14, 1957, a Special Employee of the Federal Bureau of Narcotics made arrangements with Adrienne Simmrin for her to buy some marijuana.** He

*S. Tr. refers to the Reporter's Transcript of hearings on appellants' motion to suppress evidence on February 10 and 14, 1958.

**The Special Employee was known to Adrienne Simmrin as Chuck Iskowitz [Tr. 75-80]. Compare with the statement at page 7e of Appellants' Brief: "The Government refused to disclose the name of the special employee on the grounds of privilege and said they were going to take that position throughout the trial (R. T. 94, transcript of Feb. 10 and Feb. 14, 1958)."

picked Miss Simmrin up at her apartment, 152 South Reeves Drive, Beverly Hills, California, at about 9:45 p.m., and they drove to 20652 Pacific Coast Highway. During the trip she said that she was going to "pick up" from Bob Johnson. After they arrived Miss Simmrin went into Apartment 3 for about ten minutes. She met Robert Johnson there and asked him if he had two cans of "marijuana pot." He gave her two envelopes containing 690 grains of marijuana and she gave him \$20 which she had gotten from the Special Employee. This was the transfer charged in Count One. She returned to the Special Employee's car and they drove back to her apartment. Later, the Special Employee met the federal narcotics agents and turned the marijuana over to them. Miss Simmrin was followed during the evening by Agent Katz and four or five other federal narcotics agents, including Agents Lang and Jackson [S. Tr. 63-70; Tr. 58, 75-80, 89-92, 99-104, 161-163, 184].

On November 26, 1957, Agent Katz gave the Special Employee \$20 in marked official advance funds.* The Special Employee again picked up Miss Simmrin at her apartment and they drove to 20652 Pacific Coast Highway. They arrived at about 1:30 p.m. Miss Simmrin went to Apartment 3 and either knocked or rang the bell. No one answered. She returned to the Special Employee's car and they drove off. They returned about 2:30 p.m. and Miss Simmrin again went to the door and knocked. Again, no answer. She returned to the Special Employee's car and they drove away. They returned

*The Special Employee was known to Agent Lang as Burl Ramm [S. Tr. 102]. Compare with the statement at page 7e of Appellants' Brief that: "The government refused to disclose the name of the special employee on the grounds of privilege and said they were going to take that position throughout the trial (R. T. 94, transcript of Feb. 10 and Feb. 14, 1958)."

about 3:00 p.m. This time Dona Johnson answered. Miss Simmrin went into the apartment and stayed for about ten minutes. She returned to the Special Employee's car and they started away, but only after the Special Employee had given a pre-arranged hand signal to the agents indicating that Miss Simmrin had bought some marijuana. About half a mile down the road Agent Lang and others arrested Adrienne Simmrin. She had two plastic packages of marijuana in her possession which she had bought from Dona Johnson. She was followed during the afternoon by Agents Katz and Lang [S. Tr. 70-77, 101-106].

The narcotics agents had no advance knowledge that Miss Simmrin and the Special Employee were going to the Johnson Apartment on November 26th [S. Tr. 117, 135]. The Apartment, incidentally, was about an hour's drive from the United States Attorney's and United States Commissioner's offices in the Federal Building [S. Tr. 136-137].

Immediately after Simmrin's arrest, Agents Lang, Katz, Jackson and others went to Apartment 3 and rang the bell or knocked. Dona Johnson answered the door. Before entering, Agent Lang (1) showed her his credentials, (2) told her that he was a Federal Narcotics Agent, and (3) told her that she was under arrest for selling marijuana to Adrienne Simmrin [S. Tr. 106-109, 127-128; Tr. 104, 163-164, 177-178, 182]. The agents then searched the apartment in Dona Johnson's presence with these results:

(1) Agent Jackson found the \$20 in marked money in the bedroom [S. Tr. 109-111; Tr. 105, 185].

(2) Agent Jackson found two plastic packages of marijuana in the bedroom [S. Tr. 111-112; Tr. 59-60, 105-106, 165, 186].

(3) Agent Walton found marijuana in the kitchen area [S. Tr. 112; Tr. 60-61, 107-108, 165-166, 200].

The marijuana found in the bedroom and kitchen area was the concealment charged in Count Three.

The search took place between 3:45 p.m. and 4:50 p.m. [S. Tr. 128; Tr. 153, 179].

Soon after the search Robert Johnson drove up in a cream-colored Cadillac Coupe de Ville, wearing a duck-tail type haircut and a goatee. Agent Katz arrested him while he was still in the Cadillac. Agents Jones, Jackson, Cullen and Walton then searched the car in Johnson's presence. Agent Jones found an envelope containing marijuana under the front seat [S. Tr. 138-143; Tr. 108-109, 166-168, 188-191, 209-213, 244]. This was the concealment charged in Count Four.

I.

The Evidence Should Be Viewed Most Favorably to the Government.

Defense Counsel has quoted at length from the testimony of Robert and Dona Johnson, as though the Judge believed their testimony and disbelieved that of the Government witnesses (Appellants' Br. pp. 7a-7g). Suffice it to say that this Court should not weigh the evidence or pass on the credibility of witnesses. The convictions should be sustained if there was substantial evidence, taking the view most favorable to the Government, to support it.

United States v. Glasser, 315 U. S. 60, 80 (1942);
Dean v. United States, 246 F. 2d 335, 336-337
(8th Cir., 1957);

United States v. Brown, 236 F. 2d 403, 405 (2d
Cir., 1956);

Arena v. United States, 226 F. 2d 227, 229 (9th Cir., 1955), cert. den. 350 U. S. 954 (1956);
Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953), cert. den. 347 U. S. 937 (1954);
Woodward Laboratories v. United States, 198 F. 2d 995, 998 (9th Cir., 1952);
O'Leary v. United States, 160 F. 2d 333 (9th Cir., 1947).

II.

There Were No Unlawful Searches and Seizures in Violation of the Fourth and Fifth Amendments.

We begin with the basic principle that a search of the person and "the place where the arrest is made" is valid if it is incident to a lawful arrest.

Agnello v. United States, 269 U. S. 20, 30 (1925);
Carroll v. United States, 267 U. S. 132, 158 (1924);
Weeks v. United States, 232 U. S. 383, 392 (1914).

Perhaps the best statement of this principle is in *United States v. Rabinowitz*, 339 U. S. 56, 61 (1950), where the Court said:

"Decisions of this Court have often recognized that there is a permissible area of search beyond the person proper. Thus in *Agnello v. United States*, 269 U. S. 20, 30, this Court stated:

"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as

weapons and other things to affect an escape from custody, is not to be doubted.’

“The right ‘to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed’ seems to have stemmed not only from the acknowledged authority to search the person, but also from the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest. *Weeks v. United States*, 232 U. S. 383, 392. It became accepted that the premises where the arrest was made, which premises were under the control of the person arrested and where the crime was being committed, were subject to search without a search warrant. Such a search was not ‘unreasonable.’ *Agnello v. United States*, 269 U. S. 20, 30; *Carroll v. United States*, 267 U. S. 132, 158; *Boyd v. United States*, 116 U. S. 616, 623-24.”

Were the arrests in this case lawful? 26 U. S. C. (Supp. V), Sec. 7607, added by Sec. 104(a) of the Narcotic Control Act of 1956, 70 Stat. 570, provides as follows:

“The Commissioner . . . and agents, of the Bureau of Narcotics . . . may—

* * * * *

“(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.”

The only question then is whether the Agents had “reasonable grounds” within the meaning of Section 104(a), *supra*, and “probable cause” within the meaning of the Fourth Amendment* to believe that Robert and Dona Johnson had committed or were committing violations of the narcotic laws.

In *Brinegar v. United States*, 338 U. S. 160, 175 (1949), the Court defined “probable cause” in these words:

“In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

“ ‘The substance of all the definitions’ of probable cause ‘is a reasonable ground for belief of guilt.’ *McCarthy v. De Armit*, 99 Pa. St. 63, 69, quoted with approval in the *Carroll* opinion, 267 U.S. at 161. And this ‘means less than evidence which would justify condemnation’ or conviction, as Marshall, C. J., said for the Court more than a century ago in *Locke v. United States*, 7 Cranch 339, 348. Since Marshall’s time at any rate, it has come to mean more than bare suspicion: Probable cause exists where ‘the facts and circumstances within their [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a

*The terms “reasonable grounds” in Sec. 104(a) and “probable cause” in the Fourth Amendment mean substantially the same thing.

Draper v. United States, 358 U. S. 307, 310 (1959).

man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132, 162.

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

Statements of a special employee may be "reasonable grounds" and "probable cause" for an arrest.

Draper v United States, 358 U. S. 307, 311-312 (1959).

What were the facts showing "reasonable grounds" and "probable cause" for the arrest of Dona Johnson?

On November 26, 1957, the Special Employee picked up Miss Simmrin about 1:30 p.m. and they drove to Dona Johnson's place at 20652 Pacific Coast Highway. After two tries, Miss Simmrin finally found Dona Johnson at home. Miss Simmrin went into the Apartment and bought \$20 worth of marijuana from Dona Johnson.

Agent Lang, who had been following Miss Simmrin arrested her soon after she left the apartment and, a short time later, returned to the apartment and arrested Dona Johnson [S. Tr. 70-77, 101-106]. In denying a motion to suppress, Judge Byrne said:

“But at any rate, in this particular case under the circumstances of this case there was probable cause for the arrest, and after the arrest the search had to be made immediately or the evidence would have disappeared, and under those circumstances—that is the type of case where it is proper to make a search without going down.

“The evidence here shows that there had been several calls at the home of Dona Johnson and she wasn’t there. No one answered the phone. She wasn’t there constantly—answered the door, rather—and finally they found her at the door. That is when the sale was made to Simmrin, apparently. There was reasonable cause to believe that a sale was made to Simmrin. And after that sale was made to Simmrin, of course they couldn’t go back and arrest Johnson and then go and expect to get a search warrant and find anything there. The search had to be made immediately after the arrest was made. And insofar as waiting to make the arrest, it was reasonable to believe that they might not even have found her there” [S. Tr. 146-147].

What were the facts showing “reasonable grounds” and “probable cause” for the arrest of Robert Johnson?

Marks and Berger were arrested for the sale and possession of marijuana on September 12, 1957. They told Federal Narcotics Agents Katz and Lang that their source

of supply was Robert Johnson, whom they described as white, male, American, blond hair, early twenties, six feet tall, 185 pounds, and wearing a goatee [S. Tr. 60-63].

On November 14, 1957, the Special Employee picked up Miss Simmrin and they drove to Mr. Johnson's home at 20652 Pacific Coast Highway. During the trip she said that she was going to "pick up" from Bob Johnson. When they arrived she went into Apartment 3 and bought two envelopes of marijuana from Robert Johnson [S. Tr. 63-70]. She was followed by Agent Katz and four or five other agents [S. Tr. 63-69].

On November 26, 1957, the agents searched Johnson's apartment incident to the arrest of Dona Johnson, and found marijuana in the kitchen and bedroom [S. Tr. 111-112]. Soon after the search, Robert Johnson drove up in his Cadillac, wearing a ducktail haircut and a goatee [Tr. 166-168, 243]. Agent Katz arrested him in his car [S. Tr. 87-90].

The Government argues that the above facts show that the agents had "reasonable grounds" and "probable cause" for believing that both Robert and Dona Johnson had committed or were committing felonies.

We now come to the searches. Our only question is whether they went beyond the places where the arrests were made, or as stated in *Rabinowitz, supra*, whether they went beyond the premises "under the control" of the persons arrested.

The search of the Apartment was incident to the arrest of Dona Johnson.

Clearly, the entire Apartment was under her control. In *Hamer v. United States*, 259 F. 2d 274 (9th Cir., 1958), cert. denied 359 U. S. 916 (1959), petition for rehearing

denied 359 U. S. 962 (April 6, 1959), for instance, the search of Mrs. Hamer's home and "an unlocked 4' x 4' laundry room, in the rear yard" was held valid as being incident to a lawful arrest therein. And in *Harris v. United States*, 331 U. S. 145, 151-152 (1947), the Court again upheld the search of an entire dwelling incident to a lawful arrest. The Court said:

"The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control. Thus in *Agnello v. United States*, *supra*, at 30, it was said: 'The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.' It is equally clear that a search incident to arrest, which is otherwise reasonable, is not automatically rendered invalid by the fact that a dwelling place, as contracted to a business premises, is subjected to search.

"Nor can support be found for the suggestion that the search could not validly extend beyond the room in which petitioner was arrested. Petitioner was in exclusive possession of a four-room apartment. His control extended quite as much to the bedroom in which the draft cards were found as to the living room in which he was arrested. The canceled checks and other instrumentalities of the crimes charged in the warrants could easily have been concealed in any

of the four rooms of the apartment. Other situations may arise in which the nature and size of the object sought or the lack of effective control over the premises on the part of the persons arrested may require that the searches be less extensive. But the area which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment.”

See also:

Marron v. United States, 275 U. S. 192, 198-199 (1927);

Agnello v. United States, 269 U. S. 20, 30 (1925);

United States v. Lindenfeld, 142 F. 2d 829 (2d Cir. 1944) cert. den. 323 U. S. 761 (1944);

Matthews v. Correa, 135 F. 2d 534 (2d Cir., 1943);

United States v. 71.41 Ounces Gold, 94 F. 2d 17 (2d Cir., 1938).

The search of the Cadillac was incident to the arrest of Robert Johnson.*

The search of an automobile is valid where there is probable cause to believe that it has been used in the commission of a crime.

Brinegar v. United States, 338 U. S. 160 (1949);

Carroll v. United States, 267 U. S. 132 (1924).

*Compare with Appellants' Brief at page 7h where it is stated: “. . . nor would a warrant for arrest of someone in the house justify the search of the automobile.”

III.

The Court Did Not Err in Refusing to Allow Defense Counsel to Learn the Addresses of the Jurors.

Defense counsel asked for the specific address of each juror. The Court ruled that "all that is required of you is that you state the particular portion of the district in which you reside, without giving your exact address" [Tr. 9-10, 29]. In response to this instruction the jurors gave these answers: "I live in Hollywood, in the Los Feliz area" [Tr. 9]; "Westwood" [Tr. 10]; "Beverly Hills" [Tr. 11]; "Long Beach" [Tr. 11]; "I guess you would call it central Los Angeles . . . up Venice, west of Crenshaw" [Tr. 11-12]; "I live in La Habra" [Tr. 12]; "I live in the Pico-Robertson District, Los Angeles 25" [Tr. 12]; "North Hollywood" [Tr. 12]; "In the Hancock Park district" [Tr. 13]; "Glendale" [Tr. 13]; "Pasadena, Oak Knoll area" [Tr. 13]; "Athletic Club, 431 West Seventh Street" [Tr. 14]; "La Mirada" [Tr. 18]; "In Burbank" [Tr. 20]; "In the Wilshire district" [Tr. 22]; "Melrose and Fairfax" [Tr. 23]; "Orange County, Fullerton, to be exact" [Tr. 25]; "Los Angeles" [Tr. 27]; "La Puente" [Tr. 29]. The Judge asked the jurors questions of his own [Tr. 5-31], and asked all questions requested by counsel [Tr. 15-31]. The defense counsel did not use all of his peremptory challenges and he does not claim that the jury was biased or impartial in any respect.

The scope of *voir dire* examination of jurors is within the sound discretion of the trial court.

Frederick, et al. v. United States, 163 F. 2d 536, 550-551 (9th Cir., 1947); cert. den. 332 U. S. 775 (1947);

Brady v. United States, 26 F. 2d 400, 403 (9th Cir., 1928), cert. den. 278 U. S. 621 (1928).

The refusal to order the jurors to give their residence addresses was not error.

Hamer v. United States, 259 F. 2d 274, 276-280 (9th Cir., 1958), cert. den. 359 U. S. 916 (1959), pet. for rehear. den. 359 U. S. 962 (April 6, 1959);

Wagner v. United States, 264 F. 2d 524, 526-528 (9th Cir., 1959).

IV.

The Verdicts and Judgments Were Not Contrary to the Law or Evidence.

Knowing concealment of narcotics may be proved by circumstantial evidence.

Mullaney v. United States, 82 F. 2d 638 (9th Cir., 1936);

Rosenberg v. United States, 13 F. 2d 369 (9th Cir., 1926);

United States v. Pinna, 229 F. 2d 216 (7th Cir., 1956);

United States v. Piasano, et al., 193 F. 2d 361 (7th Cir., 1951).

The circumstantial evidence showing Robert Johnson's knowing concealment of the marijuana in Count Three was as follows: He lived in Apartment 3 at 20652 Pacific Coast Highway, the place where the marijuana was found [Tr. 240]. On November 14, 1957 he had sold marijuana to Adrienne Simmrin in that apartment [Tr. 58, 75-80, 89-92, 99-104].

The circumstantial evidence showing Robert Johnson's knowing concealment of the marijuana in Count Four was

as follows: He owned the Cadillac in which it was found [Tr. 249-250], and he had been driving it just before the search [Tr. 108-109].

The circumstantial evidence showing Dona Johnson's knowing concealment of the marijuana in Count Three was as follows: She lived in Apartment 3 at 20652 Pacific Coast Highway, and was there when the marijuana was found.

V.

There Was No Error in the Instruction on Joint and Constructive Possession or in the Instruction on Presumption From Possession.

The Court gave the following instructions:

“Counts 3 and 4 of the indictment allege violation of Title 21, United States Code, Section 176(a), which provides in pertinent part as follows:

‘Notwithstanding any other provisions of law, whoever, knowingly, with intent to defraud the United States, * * * receives, conceals, * * * or in any manner facilitates the transportation, concealment, * * * of such marijuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, * * *’ shall be guilty of an offense.

“You are instructed that the word ‘facilitate’ as used in the statute and indictment is subject to the ordinary dictionary definition; that is, ‘facilitate’ means to make easy or less difficult, or to be free from difficulty or impediment.

“Section 176(a) of Title 21, United States Code, under which counts 3 and 4 of the indictment are brought, further provides in part as follows:

‘Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.’

“As stated, the law provides that if there is proof that a person shall have had in his possession marijuana, such proof is sufficient evidence to authorize conviction, unless such possession is explained to the satisfaction of the jury.

“This does not in any way change the fundamental rule that a defendant is presumed innocent and the burden is on the prosecution to prove guilt beyond a reasonable doubt. It is incumbent upon the government to show that the defendant had possession of the marijuana and this must be proved beyond a reasonable doubt. Once this is proved, the statute which I have just read merely permits the jury to infer that the marijuana involved was imported into the United States contrary to law, and the defendant so knew.

“The law recognizes two kinds of receipt or possession: actual receipt or possession, and constructive receipt or possession.

“A person who, at a given time, knowingly has direct physical control over a thing, is then in actual possession of it.

“A person who, although not in actual possession, knowingly has the power, at a given time, to exercise

dominion or control over a thing, is then in constructive possession of it.

“The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, their possession is joint.

“If you find from the evidence beyond a reasonable doubt that a defendant or defendants, either alone or jointly with others, had actual or constructive possession of the marijuana described in the indictment, then you may find that the marijuana was in the possession of such defendant or defendants within the meaning of the word ‘possession’ as used in these instructions” [Tr. 317-319].

The last five paragraphs were taken from Form 55 of the Suggested Forms for Use in Criminal Cases, 20 F. R. D. 231, 278. They merely supplement the presumption in 21 U. S. C. Sec. 176(a) which has been sustained as a rule of evidence that does not conflict with the Fourth and Fifteenth Amendments.

Caudillo v. United States, 253 F. 2d 513 (9th Cir., 1958), cert. den. 357 U. S. 931 (1958);

United States v. Cohen, 124 F. 2d 164, 165 (2nd Cir., 1941), cert. den. 315 U. S. 811 (1942);

Mullaney v. United States, 82 F. 2d 638, 641 (9th Cir., 1936);

Velasquez v. United States, 244 F. 2d 416, 418 (10th Cir., 1957);

United States v. Valdes, 229 F. 2d 145, 147 (2nd Cir., 1956), cert. den. 350 U. S. 996 (1956);

United States v. Pinna, 229 F. 2d 216, 218-219 (7th Cir., 1956);

United States v. White, 228 F. 2d 832, 834 (7th Cir., 1956);

Pon Wing Quong v. United States, 111 F. 2d 751, 758 (9th Cir., 1940).

VI.

The Court Did Not Unlawfully Communicate With the Jury.

The chronology of events was as follows:

The jury went out at 10:55 a.m. on March 13, 1958 [C. Tr. 22].

The jury went to lunch at noon and returned at 1:30 p.m. [C. Tr. 22-23].

About 2:30 p.m. the jury sent a note to the Judge stating that they had arrived at a verdict as to Dona Johnson and that they had arrived at a verdict on two counts as to Robert Johnson, but not as to the third count [Tr. 346, 350, 352]. The foreman gave the note to the bailiff who took it to the Judge. The Judge told the bailiff: "Let them sit." The bailiff then told the jury that he had delivered the note to the Judge and that they should continue to deliberate [Tr. 348, 353].

About 2:50 p.m. the jury sent the Court a second note as follows:*

"Your Honor, we wish to hear the testimony of Mr. Johnson in his last statement. J. Harold Williams, Foreman."

*There is a conflict in the testimony as to whether this was the first or second note. My brief sets out the version of the Foreman.

The jury was brought into Court and the testimony read in the presence of appellants and their counsel [C. Tr. 23, Tr. 328-333, 348-349, 352-353]. At 3:00 p.m. the jury went out to deliberate again [C. Tr. 23].

About 4:00 p.m. the jury sent the Court a third note:

“Your Honor, we have reached a unanimous decision. J. Harold Williams, Foreman” [Tr. 347, 349, 354].

At 4:10 p.m. the verdict was read in the presence of appellants and their counsel [Tr. 23].

Defense counsel made a motion for a new trial on March 21, 1958, alleging that there was an “unlawful communication between the court and jury during the deliberation of the jury” [C. Tr. 24-28]. The Court denied the motion, saying:

“The Court: Well, I might say this with respect to your motion respecting communication: What occurred was just what was testified to by the two witnesses. Under what theory would you consider that unlawful communication? How could the court possibly get word from the jury whether they had arrived at a verdict, or whether they hadn’t arrived at a verdict, if they did not deliver that message to the bailiff to deliver to the court?”

“As a matter of fact, there is no requirement in the law that the instructions be written at all.

“My own personal instruction to the jury, which I always give, is that any note or any communication that be sent to the court be written. I do that in both civil cases and criminal cases, through an abundance of caution, but there is no requirement in the law.

“As a matter of fact, most judges—I know most judges in the courts that I have been merely have word sent down by word of mouth. But through an abundance of caution, as I have indicated, I have a written note, so that persons who wish to reflect upon the actions of the court may not say that something else occurred than might be in the note.

“Insofar as the note with respect to testimony being read, I handed that note to the clerk or put it up here. There was no requirement that it be put in the file. It didn’t have to be put in the file. Whether he puts those in the file or not, I don’t know. Frankly, I usually hand those notes up here, because when the jury comes down I ordinarily refer to the note and I put it up here.

“With respect to the note that the foreman sent to the court advising the court that the jury had reached a verdict with respect to Dona Johnson and had reached a verdict with respect to Robert Johnson on two counts but had not on the third count, when I received that note, frankly, I just crumpled it up and threw it in the waste basket and said, ‘Let them sit.’ Because that is the prerogative of the judge. The judge may call them down or permit them to sit there.

“The jury had been out for about two and a half hours, something of that sort. As I recall, it was in the middle of the afternoon. They had been out only a few hours, and in my judgment they should have remained out until they had completed further deliberations. And that is not a communication between the court and the jury in the sense that you are referring to in the case which you cited to the court, the Albion case” [Tr. 356-358].

The Judge was right. The length of time a jury may be held for deliberation rests in the discretion of the trial court.

Haupt v. United States, 330 U. S. 631, 643 (1947);

Jenkins v. United States, 149 F. 2d 118, 119 (5th Cir., 1945), cert. den. 326 U. S. 721 (1945);

Minkow v. United States, 5 F. 2d 319 (4th Cir., 1925);

United States v. Thomas, 52 Fed. Supp. 571, 588-593 (E. D. Wash., 1943);

Bernal v. United States, 241 Fed. 339, 342 (5th Cir., 1917), cert. den. 245 U. S. 672 (1917).

And failure to discharge a jury after they have announced a disagreement is not coercion.

Campbell v. United States, 221 Fed. 186, 188 (9th Cir., 1915);

United States v. Ingham, 97 Fed. 935, 936-937 (E. D. Pa., 1899).

In any event, not all communications between the Judge and jury are unlawful. In *United States v. Compagna*, 146 F. 2d 524 (2nd Cir., 1944), for example, the jury sent a note to the Judge asking that some of the testimony be reread. The Judge "stopped in the jury room and asked them if that is what they meant about that, if they wanted it read. They said yes. I told them they could go to lunch and we would get it ready and read it to them when we came back." Judge Learned Hand said:

"As to the visit of the judge, it is true that courts are extremely jealous of anything of the kind, once the jury has been locked up; and we do not wish to abate that jealousy in the least; it is most undesirable

that anything should reach a jury which does not do so in the court room. This is, indeed, too well settled for debate. *Mattox v. United States*, 146 U.S. 140, 150, 13 S. Ct. 50, 36 L. Ed. 917; *Fillipon v. Alboin Vein Slate Co.*, 250 U. S. 76, 81, 39 S. Ct. 435, 63 L. Ed. 853; *Dodge v. United States*, 2 Cir., 258 F. 300, 303, 304, 7 A. L. R. 1510; *Little v. United States*, 10 Cir., 73 F. 2d 861, 864, 865, 96 A. L. R. 889. But, like other rules for the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity. *Dodge v. United States*, supra, 258 F. 300, 7 A. L. R. 1510; *Rice v. United States*, 2 Cir., 35 F. 2d 689, 696; *United States v. Graham*, 2 Cir., 102 F. 2d 436, 444. There cannot be the slightest doubt here that the informality-for, at most, it was no more—did not prejudice the accused.”

See also:

Ferrari v. United States, 244 F. 2d 132, 143-146 (9th Cir., 1957), cert. den. 355 U. S. 873 (1957);

Peppers v. United States, 37 F. 2d 346 (6th Cir., 1930).

VII.

The Court Did Not Err in Denying Motions for Judgment of Acquittal.

The Government believes that the evidence, previously set forth in the Statement of Facts, was sufficient to sustain the verdicts.

VIII.

The Court Did Not Err in Giving an Instruction in the Language of 26 U. S. C., Sec. 7491.

The Judge gave this instruction:

“Count 1 of the indictment charges a violation of Title 26, United States Code, Section 4742(a), which section provides in pertinent part as follows:

‘It shall be unlawful for any person . . . to transfer marijuana except in pursuance of a written order of the person to whom such marijuana is transferred, on a form to be issued in blank for that purpose by the Secretary of the Treasury or his delegate.’

“Under the laws of the United States there is imposed upon all transfers of marijuana, with exceptions hereafter described, a special tax. In connection with this tax the law requires that at the time a transfer of marijuana is made, the transferee must draw a written order for the same on a form issued for that purpose by the Secretary of the Treasury. The transferee is the person who, upon transfer of the marijuana, receives the marijuana. The special tax is to be paid by the transferee at the time he obtains the order form.

“When the transfer of marijuana is made, the transferee, in order to comply with the laws relating to the transfer of marijuana, and having previously obtained the order form, in duplicate, is required to give a copy to the person from whom he obtained the marijuana, and he is further required to retain a copy. The person transferring the marijuana, that is the transferor, is required by the law to receive such an

order form from the transferee before or at the time that he transfers the marijuana to such transferee. These forms must be retained by both transferor and transferee for a period of two years, and they must be kept available for inspection.

“Certain persons, such as physicians, dentists, veterinary surgeons, are excepted from the foregoing law relating to the transfer of marijuana. However, these persons must also obtain order forms and pay a special tax required by law, and must further comply with the regulations of the Secretary of the Treasury relating to the transfer of marijuana for scientific and medical purposes.

“Title 26, United States Code, Section 7491, provides in part as follows:

‘* * * in the absence of the production of evidence by the defendant that he has complied with the provisions of * * *, Section 4742, relating to order forms, he shall be presumed not to have complied with such provisions * * *.’

“The foregoing statute, however, does not change in any way the fundamental rule that a defendant is presumed to be innocent until proven guilty beyond all reasonable doubt. Nor does it impose upon the defendant the burden of producing any evidence. In other words, it is not incumbent upon the defendant to prove his innocence, but as previously stated, the prosecution must prove guilt beyond all reasonable doubt before you may convict the accused.

“What the statute does provide is that upon a trial for a violation of Section 4742 of Title 26, United States Code, if the jury should find from the evidence

beyond a reasonable doubt that the defendant has transferred marijuana, the fact of such transfer alone permits the jury to draw the inference that the defendant transferred marijuana without having obtained the necessary written order form" [Tr. 314-317].

Robert Johnson produced no evidence that he had complied with 26 U. S. C. Sec. 4742 [Tr. 167]. The statute simply states a rule of evidence which in no way contravenes the Constitution.

United States v. Williams, 161 F. 2d 835, 837 (2nd Cir., 1947).

Conclusion.

1. The evidence should be viewed most favorably to the Government.
2. There were no unlawful searches and seizures in violation of the Fourth and Fifth Amendments.
3. The Court did not err in refusing to allow counsel to learn the addresses of the jurors.
4. The verdicts and judgments were not contrary to the law or evidence.
5. There was no error in the instructions on joint and constructive possession or in the instruction or presumption from possession.
6. The Court did not unlawfully communicate with the jury.
7. The Court did not err in denying motions for judgment of acquittal.

8. The Court did not err in giving an instruction in the language of 26 U. S. C. Sec. 7491.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney,

ROBERT JOHN JENSEN,

*Assistant United States Attorney,
Chief, Criminal Division,*

ROBERT D. HORNBAKER,

*Assistant United States Attorney,
Attorneys for Appellee, United States of America.*

No. 16458 ✓

United States
Court of Appeals
for the Ninth Circuit

GEORGE Y. ERLANDSON, Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

FILED

JUL - 7 1959

PAUL P. O'BRIEN, CLERK

No. 16458

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Respondent.

The Tax Court of the United States

Docket No. 65621

GEORGE Y. ERLANDSON, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency Ap-P:AA:HH over 90D:DMK dated December 14, 1956, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with residence at Route 1, Box 1345, Florence, Oregon. The return for the period here involved was filed with the District Director of Internal Revenue, Portland, Oregon.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on December 14, 1956.

3. The deficiencies as determined by the Commissioner are in income taxes for the calendar year 1954 in the amount of \$1,960.38 of which amount \$1,672.38 is in dispute.

4. The determination of tax set forth in the said

notice of deficiency is based upon the following errors:

(a) in determining the taxable income of the petitioner for the year 1954 the Commissioner erroneously included wages of \$10,299.97 received by petitioner as compensation for personal services. The Commissioner contends that such compensation for services is includible in gross income in accordance with the provisions of Section 61(a) of the Internal Revenue Code of 1954.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) petitioner is an individual citizen of the United States.

(b) petitioner was present in a foreign country or countries for at least 510 full days in the 18 consecutive month period prior to April 16, 1954 (October 16, 1952 to April 15, 1954).

(c) the said sum of \$10,299.97 was received by petitioner in 1954 as compensation for personal services rendered while so present in foreign countries within said period.

(d) petitioner was not paid by the United States or any agency thereof.

(e) the days set forth in paragraph (b) bear the ratio of the days of 1954 as \$5,753.76 does to \$20,000.00.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that the sum of \$5,753.76 of the sum of \$10,299.97 received

in 1954 as wages shall not be included in gross income and exempt from taxation and the deficiency due from the petitioner for the year 1954 should not be in excess of \$288.00.

/s/ RALF H. ERLANDSON,
Counsel for Petitioner.

Duly Verified.

EXHIBIT "A"

Appellate Division

P. O. Box 3935, Portland 8, Oregon

Ap-P:AA:HH

90D:DMK

Dec. 14, 1956

Mr. George Yngve Erlandson
Mercer Lake, Route 1 North
Florence, Oregon

Dear Mr. Erlandson:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1954 discloses a deficiency of \$1,960.38, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with the Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 9th day is a Sat-

urday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner (Appellate), P. O. Box 3935, Portland 8, Oregon. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

RUSSELL C. HARRINGTON,
Commissioner,

/s/ By A. N. WILLIAMS,
Associate Chief, Appellate Division.

Enclosures:

Statement

IRS-160

Agreement Form

DMKING rf

EXHIBIT "A"

Ap—P:AA:HH
90D:DMK

STATEMENT

George Yngve Erlandson
Mercer Lake, Route 1 North
Florence, Oregon
(Formerly: Masters, Mates &
Pilots #90, Seattle, Washington)

Income Tax Liability for the Taxable Year Ended December 31,
1954.

Year	Deficiency
1954	\$1,960.38

In making this determination of your tax liability, careful consideration has been given to the report of examination transmitted to you May 23, 1956, to your protest received June 7, 1956, to statements made by you in conference on August 13, 1956 and to statements made by your authorized representative in conferences on August 13, 1956 and November 6, 1956.

A copy of this letter and statement has been mailed to your representative, Mr. Ralf H. Erlandson, 1935 Washington Street, Milwaukie 22, Oregon, in accordance with authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1954

Adjustments to Net Income

Net income (loss) disclosed by return\$ (402.48)

Unallowable deductions and additional income:

(a) Wages\$10,299.97

Nontaxable income and additional deduction:

(b) Standard deduction 96.38

Total adjustment increase 10,203.59

Net income as adjusted\$ 9,801.11

Explanation of Adjustments

(a) In the computation of your taxable income you failed to include the seaman's wages of \$10,299.97, which were received by you during the year. It is held that such compensation for services is includible in gross income in accordance with the pro-

visions of Section 61(a) of the Internal Revenue Code of 1954.

(b) Standard deduction of \$1,000.00 is allowed, to your advantage, in lieu of itemized deductions of \$903.62 as shown by return, a reduction in net income of \$96.38.

Computation of Tax

Net income as adjusted	\$9,801.11
Less: Exemptions (3) x \$600	1,800.00
	<hr/>
Taxable income	\$8,001.11
	<hr/>
*Income tax liability—single person	\$1,960.38
Income tax—Liability disclosed by return:	
A/c No. CE-1000065	None
	<hr/>
Deficiency	\$1,960.38
	<hr/>

* Head of Household has not been allowed inasmuch as you did not occupy the household for the entire taxable year.

Served and Entered January 29, 1957.

[Endorsed]: T.C.U.S. Filed January 23, 1957.

[Title of Tax Court and Cause.]

AMENDED ANSWER

The Respondent, in answer to the petition filed in the above-entitled case, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits the allegations contained in paragraph 3 of the petition, except that, for lack of sufficient knowledge or information upon the basis of which

to form a belief as to the truth or falsity thereof, denies that only the amount of \$1,672.38 is in dispute.

4. Denies the allegations of error contained in paragraph 4(a) of the petition.

5. (a) Admits the allegations contained in paragraph 5(a) of the petition.

(b), (c), (d) and (e) Denies the allegations contained in paragraph 5(b) to (e), inclusive, of the petition.

6. Denies generally each and every material allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the deficiency determined by respondent be in all respects approved.

/s/ NELSON P. ROSE, J.H.P.

Chief Counsel, Internal
Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel,
John H. Pigg, Assistant Regional Counsel, Internal Revenue Service, P. O. Box 3935, Portland, Oregon.

Served and Entered May 13, 1957.

[Endorsed]: T.C.U.S. Filed May 8, 1957.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated that, for the purpose of this case, the following statements may be accepted

as facts, and all exhibits referred to herein and attached hereto are incorporated in this stipulation and made a part thereof; provided, however, that either party may introduce other and further evidence not inconsistent with the facts herein stipulated.

1. The petitioner was employed as navigation officer on the M/V Jumper Hitch during the period in question.

2. The petitioner received the total sum of \$10,-299.97 in 1954, as compensation for personal services performed by the petitioner on the M/V Jumper Hitch.

3. Exhibit 1-A, attached hereto, is a true copy of the Service Agreement, Contract MA-82-GAA, dated April 6, 1951, and Addendum No. 1 to the Service Agreement, Contract MA-82-GAA, dated October 5, 1951, entered into between Pacific Far East Line, Inc. and the United States of America acting by and through the Director, National Shipping Authority of the Maritime Administration, Department of Commerce.

/s/ RALF H. ERLANDSON,
Counsel for Petitioner.

/s/ ARCH M. CANTRALL, G.W.P.
Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

[Endorsed]: T.C.U.S. Filed March 4, 1958.

[Title of Board and Cause.]

TRANSCRIPT OF PROCEEDING

U. S. Court of Appeals, U. S. Courthouse (New),
Portland, Oregon. Monday, March 3, 1958.

(Met, pursuant to notice, at 10:20 o'clock a.m.)

Before: Hon. Bruce M. Forrester, Judge.

Appearances: Ralf H. Erlandson, Esq., 1935
Washington, Milwaukie, Oregon, appearing on be-
half of Petitioner. Jack T. Fuller, Esq., 484 Pit-
tock Block, Portland, Oregon, appearing on behalf
of Respondent. [1]*

* * * * *

GEORGE Y. ERLANDSON

was called as a witness on behalf of the Petitioner
and, having been first duly sworn, testified as
follows:

The Clerk: Will you have a seat, please, sir, and
state your name and address for the record?

The Witness: My name is George Y. Erlandson;
Box 1345, Route 1, Florence, Oregon.

Direct Examination

Q. (By Mr. R. Erlandson): You are the peti-
tioner in this case? [10] A. Yes.

Q. What is your usual occupation, Mr. Erland-
son? A. I am a seaman.

Q. And how long have you been following that
occupation? A. For eighteen years.

Q. And what certificates or licenses do you hold?

* Page numbers appearing at top of page of Reporter's Tran-
script of Record.

(Testimony of George Y. Erlandson.)

A. I have a Master's license.

Q. And is there any limitation on that license?

A. Unlimited.

Q. For any ship and any waters, is that correct?

A. Yes.

Q. How long have you held a Master's license?

A. For nine years.

Q. Between the periods of January 21st, 1952 and April 10th, 1954, were you employed as a seaman?

A. Yes, I was employed by Pacific Far East Lines on the Jumper Hitch as Second Officer.

Mr. Fuller: We object, your Honor. We dispute the fact that he was employed by the United States. We think that is a conclusion of law.

The Court: Bring out the facts, please, from this witness, exactly how he was paid and by what checks and other details of it.

Mr. Fuller: Your Honor, may that answer be stricken from the record? [11]

The Court: Let me hear that answer, please—the question and answer.

(Previous question and answer repeated by Reporter.)

The Court: It will be stricken.

Mr. R. Erlandson: Might I inquire, your Honor, whether the answer was stricken because it was not responsive to my question or on other grounds?

The Court: No, I think it was responsive. It is a conclusion on the part of this witness.

Q. (By Mr. R. Erlandson): Now, you were em—

(Testimony of George Y. Erlandson.)

ployed on the motor vessel Jumper Hitch, is that correct? A. Yes.

Q. During this period from January—— (interrupted) A. Yes.

Q. ——21st, 1952 to April 10th, 1954?

A. Yes.

Q. Now, how are you employed on that vessel? What agreements do you sign?

A. Well, I signed shipping articles, which the first articles were signed for nine months in Portland, Oregon, and on January 16th, I believe, 1952. And those articles terminated in October of 1952 and the articles for the succeeding nine months were originated in San Francisco and flown out to Yokohama where the remainder of the crew signed before the American Consul in Yokohama. [12]

Q. That was the procedure in each of the—— (interrupted)

A. The last two—— (interrupted)

Q. The last two times. And that would have occurred roughly in October of '52?

A. And July of '53.

Mr. R. Erlandson: Would you mark this for identification, please?

The Clerk: Exhibit 2 for identification.

(Whereupon, a document was marked for identification as Petitioner's Exhibit 2.)

Q. Would you tell the Court what this document purports to be?

A. These are a duplicate of the shipping arti-

(Testimony of George Y. Erlandson.)

cles that were signed in Portland, Oregon, in January of 1952.

Q. Do you know how that duplicate was obtained?

A. Yes, it is a photostatic copy of the duplicate of the originals that were obtained from the Shipping Commissioner's office.

Mr. Fuller: Your Honor, we have no objection to this being admitted in evidence.

The Court: All right, it will be received in evidence.

Mr. R. Erlandson: We offer it.

The Court: Without objection. [13]

(Whereupon, the document marked Petitioner's Exhibit 2 for identification was received.)

* * * * *

Q. (By Mr. Erlandson): And the only way that you could possibly have been outside the three-mile limit for twenty-four hours consecutively is if an unusual storm came up—a typhoon? A. Yes.

Q. And you don't recall a single typhoon?

A. No, I don't.

Q. You may resume the witness chair now.

Mr. R. Erlandson: Your Honor, we would like to offer in evidence the Exhibit Number 3 and 4 for identification, as Exhibits 3 and 4.

Mr. Fuller: We have no objection, your Honor.

The Court: They will be admitted.

(Whereupon, the documents marked Petitioner's Exhibits 3 and 4 for identification were received.)

(Testimony of George Y. Erlandson.)

Mr. Fuller: Your Honor, we would like it entered in the record that the lines that he has traced as the ship's course are merely approximations.

Mr. R. Erlandson: Yes, we will agree to that.

The Court: I believe the record so shows.

Q. Now, do you know who owned this—the M/V Jumper Hitch?

A. It was owned by the United States Government.

Q. Do you know—well, this ship was operated by Pacific Far East Lines under a general agency agreement?

A. Yes. [28]

Q. Now, were you aware of any Government regulations affecting the operation of this ship?

A. Of Government—you mean—— (interrupted)

Mr. Fuller: I object, your Honor. This has no significance.

Mr. R. Erlandson: I believe it does, your Honor. The agency agreement states that the United States appoints this steamship company as their general agent and not as an independent contractor and recites the United States can issue regulations and that sort of thing, and I think it is very impertinent to know whether or not any regulations were issued, at least that would come to the notice of the officers of the ship.

The Court: He can answer the question yes or no. I am going to overrule the objection for the time being and then if you want to renew it to any specific regulation that is asked about, you may, of course.

(Testimony of George Y. Erlandson.)

A. No, I didn't come into contact with any regulations emanating from this Federal agency.

Q. Are you familiar with the operation of steamships, generally?

A. In a general way, yes.

Q. You have never served as Master on a vessel?

A. No, I have not.

Q. You have served as Chief Mate on a ship?

A. Yes. [29]

Q. For how long a period of time?

A. For possibly five years as Chief Officer.

Q. And as Chief Officer, did you have a fairly close working contact with the company officials of the various companies you worked for?

A. Yes.

Q. So you had an opportunity to observe their general practices, did you not?

A. Yes, I did.

Q. Well, now, did you have an opportunity to observe the general practice of the shoreside agents in Japan and Korea servicing this ship?

A. Well, our agents in most ports in Japan were United States Lines and I came into contact with the agents as they came aboard the ships. In Korea, our agents were Everett Steamship Company.

Q. And those agents were representing whom?

A. Those agents were representing—— (interrupted)

Mr. Fuller: I object, your Honor, to that question. I believe that calls for a conclusion of which the witness has no knowledge.

(Testimony of George Y. Erlandson.)

The Court: Develop how he knows. Ask him first if he knows and then the balance afterwards.

Q. Do you know who the agents were representing? [30]

A. They were representing—— (interrupted)

The Court: Just answer yes or no.

Q. Just answer yes or no, please. A. Yes.

Q. Well, how do you happen to know that?

A. Well, I don't know how I happen to know it. I can't—— (interrupted)

Q. Well, did you ever have any conversation with the agents?

A. Yes, I did, I had conversation with their agents. Of course, our mail was addressed to United States Lines in Yokohama and our mail in Korea came through Everett Steamship Company.

Q. Did you ever see any correspondence from the Pacific Far East Lines concerning any of these shoreside agents? A. No, I didn't.

Mr. Fuller: We submit, your Honor, that the witness has indicated by his testimony that he is not qualified to testify as to—— (interrupted)

The Court: Well, let's let him go a little further to see what else he is able to develop.

Q. Did you have any conversations with the Master regarding the shoreside agents?

A. Not that I can recall.

Q. It was merely the general reputation on the ship [31] that these agents were—— (interrupted)

Mr. Fuller: Your Honor, we object to that as a leading question. He is leading his own witness.

(Testimony of George Y. Erlandson.)

The Court: It is leading.

Q. Was there a general reputation on the ship as to who the shoreside agents were representing?

Mr. Fuller: We object to that, your Honor. It has no significance.

The Court: I believe that is getting a little remote, the general reputation on the ship as to who the agents were.

Q. By whom were you paid?

A. By Pacific Far East Lines.

Q. And how were you paid?

A. The first two periods, I was paid by check mailed from San Francisco. For the last period, I was paid in cash in San Francisco before the U. S. Shipping Commissioner.

Q. And whom did you receive your money from?

A. From the Port Purser of Pacific Far East Lines.

Q. And that was cash, you say?

A. Yes, the last period was in cash. The first two periods was by check.

Q. And that last period was in April of '54?

A. From July of 1953 until April of 1954.

Q. Yes, and when you received your money, what was the approximate date of that?

A. Approximately the 12th of April, 1954.

Q. And the other two occasions when you received your money, approximately when was that?

A. In approximately November of 1952 and approximately August of 1953.

(Testimony of George Y. Erlandson.)

Q. I see. That is about a month after you signed the articles?

A. Yes, it was some time after we had signed the articles.

Q. Did you receive any periodic advances during this time?

A. Yes, during the voyage, we were permitted draws.

Q. And from whom did you receive the draws?

A. From the ship's purser. The draws were sent by the agent, U. S. Lines. The purser made out a draw list prior to entering a Japanese port. He notified the U. S. Lines as to how much money he needed and the U. S. Lines brought it down.

Q. In currency? A. In Japanese yen.

Q. Japanese yen. Did you receive your money in any other way? Your pay?

A. We received in Korean wen in Korea, but—— (interrupted)

Q. And by whom were you paid the Korean wen? [33]

A. By the ship's purser through the Everett Steamship Company.

Q. Now, do you know how many ships were operating in this area of Japan and Korea under this general agency agreement?

A. There were ten ships similar to the type I was on and probably there were another ten of various other types, Victory ships and Liberties.

Q. The type that you were on is called the Knot ship, is that correct?

(Testimony of George Y. Erlandson.)

A. Yes, C-1-M, AV-1 was the classification.

Q. Yes, it is popularly known as a Knot ship?

A. Yes.

Q. Among seamen?

The Court: How do you spell "knot"?

A. K-n-o-t in this case.

Mr. R. Erlandson: I believe, your Honor, the name comes from—at the beginning, the ships were generally called the Reef Knot or the Square Knot or the Rose Knot.

Q. Was there any difference in the personnel on these ships as far as you knew? The complement of the ships?

A. Some ships carried pursers and some ships did not carry pursers according to the company policy.

Q. Well, could you explain that a little further to the Court, please? [34]

Mr. Fuller: We object, your Honor. This man is not a competent witness to testify as to the company policy of other companies nor their crew members and things of that sort.

The Court: Ask him if he saw it, if he observed it himself on these other ships.

Q. Yes. Did you see that some ships had pursers and others did not?

A. Yes, I know that some companies have a policy of not carrying a purser. They pushed that work on to the Captain of the ship and saved the purser's wages, but Pacific Far East Lines carries pursers on all their ships.

(Testimony of George Y. Erlandson.)

Q. Well, now, specifically, the ships in the Japan and Korea service, under general agency agreement similar to the one with the Pacific Far East Line, can you testify as to any ship that you knew that had a purser or did not have a purser?

A. Well, the Coddington did not have a purser. That was also a Knot ship.

Q. What company operated that?

A. The Coddington was operated by Olympic Steamship Company.

Q. Do you know the company policy of Olympic Steamship Company?

A. No, I don't. I have never been on any Olympic Steamship Company ships. [35]

Q. Well, do you know the company policy of any of these ships with regard to pursers, that is.

Mr. Fuller: Your Honor, I do not see the relevancy of this line of questioning.

The Court: Well, I don't either, but I am going to let him go ahead with it. I believe the witness knows and is answering truthfully.

Q. I will repeat my question: Do you know the company policy with regard to pursers, on any specific ship over there?

A. I know that Pacific Far East Lines carries pursers on all of their ships as does American Mail Line and American President Lines all carry pursers on their ships. West Coast Trans-Oceanic does not carry pursers on their ships.

Q. Did they have a ship over there?

(Testimony of George Y. Erlandson.)

A. Yes, they had one ship. The name escapes me at the moment.

Q. Do you know of your own knowledge whether or not they had a purser on board?

A. No, they had no purser on the West Coast Trans-Oceanic ship.

Q. And on the Jumper Hitch you did have a purser? A. Yes.

Q. In Japan and Korea, from time to time, the ship required supplies and that sort of thing, I take it? A. Yes. [36]

Q. Do you know who furnished the supplies?

A. The supplies are ordered through the agents—U. S. Lines' agents procure the supplies and send them down to the ship.

Q. And who makes the order for supplies?

A. If it's steward's supplies, the Steward makes out the order and it is approved by the Master. If it's deck supplies, the Chief Mate makes out the order.

Q. And would anyone shoreside approve the requisition?

A. It's approved by the agents. The agents can refuse any supplies that they think are not required.

Q. And did you know of your own—— (interrupted)

Mr. Fuller: Your Honor, it is not clear to us when he used the term "agents" whether he means Pacific Far East Line or exactly what.

Mr. R. Erlandson: I believe he has testified,

(Testimony of George Y. Erlandson.)

your Honor, that in Korea, the agents were from the Everett Steamship Company?

A. Yes, Everett Steamship Company.

The Court: I have taken it to mean that he is talking about the so-called shoreside agents at these various points—— (interrupted)

Mr. R. Erlandson: Yes, sir.

The Court: ——rather than any agency of this operating company to the Government of the United States or any other government.

Q. Did you—is that correct, when you use the term “agent”—— (interrupted)

A. When I use the term “agent”, I am referring to the agent of Pacific Far East Lines which was at that time United States Lines in Japan and Everett Steamship Company in Korea. Those were the agents of Pacific Far East Lines.

Q. And these shoreside agents, did they make their approval or rejection of this requisition immediately, or did it take some period of time?

A. Well, of course, if they rejected a requisition, well, there was some discussion about it and I can't recall that they ever were hard to get along with in that respect.

Mr. R. Erlandson: Could we have the Court's indulgence here for a moment? We are checking on the actual returns.

Mr. Fuller: Your Honor, at this time, we would like to offer in evidence, the Petitioner's 1954 income tax return. The W-2 forms are not attached. They are being processed and—— (interrupted)

(Testimony of George Y. Erlandson.)

The Court: Any objection?

Mr. R. Erlandson: I have no objection to the admission of that, no.

The Court: It will be admitted.

(Whereupon, the document was marked for identification as Respondent's Exhibit B and received in evidence.) [38]

* * * * *

The Court: Proceed.

Mr. R. Erlandson: May I ask one or two more questions on direct examination, your Honor?

The Court: Yes.

Direct Examination—(Continued)

Q. (By Mr. R. Erlandson): Was there any union agreement covering your particular occupation during this period in question?

A. Yes, we were covered by this agreement with the Masters, Mates and Pilots, Local 90.

Q. And with whom was that agreement?

A. The agreement was with the Pacific Maritime Association. The Pacific Far East Lines was not a member of the Maritime Association, but they adhered to the same agreement. They had a separate agreement—— (interrupted)

Q. They had a separate—— (interrupted)

A. ——that was identical with the—— (interrupted)

Q. With the agreement between the Master, Mates and Pilots and the—— (interrupted)

A. The PMA—the two agreements were identical.

(Testimony of George Y. Erlandson.)

Q. PMA—you mean the Pacific Maritime Association?
A. Pacific Maritime Association.

Mr. R. Erlandson: I wonder, your Honor, if we might stipulate that we could leave the record open to submit a copy of the agreement between the Master, Mates and Pilots [47] organization and the Pacific Far East Lines, Incorporated, or Inc., when it is obtainable. As a matter of fact, we do not have a copy of that agreement. There was none available in Portland.

The Court: Do you have objection to that, Mr. Fuller?

Mr. Fuller: No, your Honor, we have no objection to the record being left open. We would of course want an authenticated copy.

Mr. R. Erlandson: Yes, perhaps we could submit it to you before sending it to the Court.

The Court: That would be better and I think we had better have a time limit on it. We don't want to leave a record open indefinitely. How much time are you going to want for briefs in this case, gentlemen?

Mr. Fuller: Forty-five days would be sufficient for me, your Honor.

Mr. R. Erlandson: That would be sufficient for me. I can submit a brief within that time.

The Court: You think you can get this authenticated copy of the agreement rather quickly?

Mr. R. Erlandson: Yes, I would hope within two weeks.

(Testimony of George Y. Erlandson.)

Mr. Fuller: I think, your Honor, we had better extend that brief period then. [48]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Fuller): Now, prior to that time, you had been paid by check, I take it?

A. Yes, prior two voyages I was paid by check.

Q. Was that check in dollars?

A. Yes, it was in dollars.

Q. Have you had the opportunity to see checks issued generally? Now, I am not talking just about checks issued to crew members, but checks issued generally by the Pacific Far East Line?

A. No, I haven't. I think that was the only checks I have seen issued by the Pacific Far East Line—those two that I received there.

Q. Do you recall any notation on the face of that check near the signature of Pacific—of the officials of Pacific Far East Line, any notation to the effect that that check was to be paid out of funds provided under the National Shipping Authority's revolving fund?

A. Oh, no, there was nothing like that on the check.

Q. You can definitely state that you saw no such notation whatsoever?

A. Well, I am certain I would have noticed it if there had been something to that effect on the check and the check was just Pacific Far East Lines. [54]

* * * * *

[Endorsed]: T.C.U.S. Filed March 25, 1958.

[Title of Tax Court and Cause.]

MOTION TO FILE DOCUMENTS

Come now the parties hereto, by their respective attorneys of record, and, pursuant to leave of the Court granted at the trial of this case at Portland, Oregon, on March 4, 1958, file herewith the following documents as additional evidence in this proceeding: (Tr. pp. 47-48, 49, and 67)

1. Copy of Form W-2, to be attached to and made a part of respondent's Exhibit B, all pursuant to order of Court. (Tr. pp. 39-40)

2. Copy of Memorandum of Agreement dated March 11, 1953, Agreement dated July 30, 1952 and Agreement dated November 14, 1951, attached hereto as Exhibit 6(1), (2) and (3).

/s/ RALF H. ERLANDSON,

Counsel for Petitioner.

/s/ ARCH M. CANTRALL, J.O.P.

Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

Served April 2, 1958.

[Stamped]: The Tax Court of the U. S. Granted
April 1, 1958.

/s/ BRUCE M. FORRESTER.

[Endorsed]: T.C.U.S. Filed March 31, 1958.

T. C. Memo. 1958-218

Tax Court of the United States

George Y. Erlandson, Petitioner, v. Commissioner
of Internal Revenue, Respondent.

Docket No. 65621. Filed December 31, 1958.

MEMORANDUM FINDINGS OF FACT
AND OPINION

Petitioner received wages for his services aboard a ship owned by the United States and operated by a private shipping firm under a general agency contract. Held, the wages were paid by the United States or an agency thereof and thus they were not tax-exempt under section 911(a), I.R.C. of 1954. Robert W. Teskey, 30 T.C. 456, followed.

Ralf H. Erlandson, Esq., for the petitioner. Jack T. Fuller, Esq., for the respondent.

Forrester, Judge: The Commissioner has determined a deficiency in the petitioner's income tax in the amount of \$1,960.38 for the calendar year 1954. The sole issue for determination is whether the petitioner is entitled to a partial exemption for the seaman's wages he earned while serving aboard an American ship operating between ports in Japan and Korea, under section 911(a)(2) of the Internal Revenue Code of 1954.

Findings of Fact

Most of the facts have been stipulated and are included herein by this reference.

The petitioner, a citizen of the United States,

filed his income tax return for the calendar year 1954 with the director of internal revenue for the district of Oregon.

In January 1952, the petitioner signed shipping articles at Portland, Oregon, to serve as Second Officer aboard the M/V Jumper Hitch.

At the trial of this case, respondent contested petitioner's claimed presence in a foreign country as prescribed by section 911(a)(2), Internal Revenue Code of 1954; however, respondent has now conceded this issue. We adopt respondent's language as our finding:

* * * the petitioner, during the 18 consecutive months immediately preceding April 10, 1954, was present in the territorial waters of a "foreign country or countries during at least 510 full days" in that period and received compensation for the services he performed abroad "from sources without the United States."

The United States of America owned the Jumper Hitch. Through and by the Director, National Shipping Authority of the Maritime Administration, Department of Commerce, the United States entered into a general agency agreement for the operation of the ship with Pacific Far East Line, Inc. This Service Agreement, dated April 16, 1951, was contract number MA-82-GAA, and in part provided the following:

This Agreement, made as of April 6, 1951, between the United States of America (herein called the "United States") acting by and through the

Director, National Shipping Authority of the Maritime Administration, Department of Commerce, and, Pacific Far East Line, Inc., a corporation organized and existing under the laws of Delaware, (herein called the "General Agent"):

* * * * *

Article 1. Appointment of General Agent. The United States appoints the General Agent as its agent and not as an independent contractor, to manage and conduct the business of the vessels assigned to it by the United States from time to time and accepted by the General Agent.

Article 2. Acceptance of Appointment. The General Agent accepts the appointment and undertakes and promises so to manage and conduct the business for the United States, in accordance with such directions, orders or regulations not inconsistent with this Agreement as the United States has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided, of such vessels as have been or may be by the United States assigned to and accepted by the General Agent for that purpose.

Article 3. Duties of the General Agent. For the account of the United States, in accordance with such directions, orders, regulations, forms and methods of supervision and inspection as the United States may from time to time prescribe (or in the absence of such directions, orders, regulations, forms and methods of supervision and inspection, in accordance with reasonable commer-

cial practices and/or the use of customary commercial forms), in an economical and efficient manner, and exercising due diligence to protect and safeguard the interests of the United States in connection with the duties prescribed in this Agreement and without prejudice to its rights under Article 6 hereof, the General Agent (solely as agent of the United States and not in any other capacity) shall:

* * * * *

(b) Collect, deposit, remit, disburse and account for all monies due the United States arising in connection with activities under or pursuant to this Agreement, and to the extent disbursements made by the General Agent pursuant to this Agreement are recoverable from insurance, the General Agent shall take such steps as may be appropriate to effect such recovery for the account of the United States.

* * * * *

(d) Procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the manning, navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators

and upon the terms and conditions of the General Agent's collective bargaining agreements, if any. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder.

* * * * *

(f) Furnish and maintain during the period that any vessel is assigned and accepted by the General Agent under this Agreement, at its own expense, a bond with sufficient surety in such amount as the United States shall determine such bond to be approved by the United States as to both sufficiency of surety or sureties and form, and to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the General Agent contained in this Agreement, including without limitation of the foregoing the condition faithfully to account to the United States for all funds collected and disbursed and funds and property received by the General Agent or its sub-agent. The General Agent may, in lieu of furnishing such bond, pledge direct or fully guaranteed obligations of the United States of the cash value of the penalty of the bond under an agreement satisfactory in form to the United States.

No monies or slop chest property of the United States shall be advanced or entrusted by the General Agent to a Master, purser or any other member of the ship's personnel unless such person is

under a bond indemnifying the United States against loss of such monies or property caused solely or in part by the dishonesty or lack of care of any such person in the performance of the duties of any position covered by the bond.

(g)(1) Keep books, records and accounts (which shall be the property of the United States) relating to the activities, maintenance and business of the vessels covered by this Agreement in such form and under such regulations as may be prescribed by the United States; * * *

There is an addendum dated October 5, 1951, to the above agreement providing, in part, the following:

Article 5. Disbursements.

* * * The United States shall also advance funds to the General Agent to provide for, and the General Agent shall receive credit for, all crew expenditures accruing during the term hereof in connection with the vessels assigned hereunder, including, without limitation, expenditures on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, internment, travel, loss of personal effects, maintenance and cure, vacation allowances, damages or compensation for death or personal injury or illness, insurance premiums, Social Security taxes, state unemployment insurance taxes and contributions made by the General Agent to a pension or welfare fund with re-

spect to the period of this Agreement and in accordance with a pension or welfare plan in effect on the effective date of this Agreement or which, pursuant to collective bargaining agreements, may become effective during the period of this Agreement with respect to the officers and members of the crew of said vessels who are or many become entitled to benefits under such plan, or any other payment required by law.

It has been orally stipulated that the United States provided the general agent with funds for the wage payments due the officers and crew of the Jumper Hitch from the Civil Operations Revolving Fund created by Congress in 1951. (65 Stat. 59)

In April 1954, the petitioner was paid \$10,299.97 by the United States Government's general agent, Pacific Far East Line, Inc., for his services performed aboard the Jumper Hitch.

The petitioner was so paid by the United States or an agency thereof.

Opinion

The only remaining question for decision is whether the petitioner was paid by the United States or an agency thereof, for, if he was paid

by either, he will not receive the exemption benefit of section 911(a)(2).¹

The recent case of Robert W. Teskey, 30 T.C. 456, involved the same issue, with facts almost identical to those present here, and we there held that the seaman involved in that case was paid by the United States or an agency thereof.

The petitioner admits that the Teskey case is in point, but requests that we overrule it. We have again carefully considered the issue and find no reason to depart from our prior position. Thus, the petitioner was paid by the United States or an agency thereof and his wages are not exempt from taxation under section 911(a)(2).

Decision will be entered for the respondent.

Served January 6, 1959.

¹ Sec. 911. Earned Income From Sources Without the United States.

(a) General Rule.—The following items shall not be included in gross income and shall be exempt from taxation under this subtitle:

* * * * *

(2) Presence In Foreign Country For 17 Months.—In the case of an individual citizen of the United States, who during any period of 18 consecutive months is present in a foreign country or countries during at least 510 full days in such period, amounts received from sources without the United States (except amounts paid by the United States or an agency thereof) if such amounts constitute earned income (as defined in subsection (b)) attributable to such period; * * * [Emphasis supplied.]

Tax Court of the United States
Washington

Docket No. 65621

GEORGE Y. ERLANDSON, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Memorandum Findings of Fact and Opinion of the Court filed December 31, 1958, it is

Ordered and Decided: That there is a deficiency in income tax for the taxable year 1954 in the amount of \$1,960.38.

[Seal] /s/ BRUCE M. FORRESTER,
Judge.

Entered January 15, 1959. Served January 19, 1959.

United States Court of Appeals
For the Ninth Circuit

T. C. Docket No. 65621

GEORGE Y. ERLANDSON, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

George Y. Erlandson, the petitioner, by Ralf H. Erlandson, his attorney, hereby files this petition for review by the United States Court of Appeals for the Ninth Circuit, of a decision of the Tax Court of the United States, filed and entered on January 15, 1959, determining deficiencies in the petitioner's Federal Income Taxes for the calendar year 1954 in the amount of \$1,960.38, and respectfully shows:

I.

The Petitioner, George Y. Erlandson, is an individual citizen of the United States and filed his income tax return for the calendar year 1954 with the District Director of Internal Revenue, Tacoma, Washington, and thereafter the matter was transferred to the District Director of Internal Revenue, Portland, Oregon, both offices are located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit where this review is sought.

This petition for review is brought pursuant to the provisions of Section 7482 and 7483 of the Internal Revenue Code of 1954.

II.

Nature of Controversy

This controversy involves the proper determination of the Petitioner's liability for federal income taxes for the calendar year 1954.

The Petitioner, an individual citizen of the United States, was employed as navigating officer on the American merchant vessel, the M/V Jumper Hitch, from January 21, 1952, to April 10, 1954.

The United States of America owned the M/V Jumper Hitch. Through and by the director, National Shipping Authority of the Maritime Administration, Department of Commerce, the United States entered into a general agency agreement for the operation of the ship with Pacific Far East Lines, Inc. The Petitioner's employment was pursuant to shipping articles executed between officers and crew on the one hand and the Master of the M/V Jumper Hitch on the other hand, and the collective bargaining agreement between the Master, Mates, and Pilots Association and the Pacific Far East Lines, Inc.

In the Tax Court of the United States, the Respondent conceded that Petitioner, during the eighteen consecutive months immediately preceeding April 10, 1954, was present in the territorial waters of a "foreign country or countries during

at least 510 full days" in that period and received compensation for the services he performed aboard "from sources without the United States."

The only question now involved is whether the Petitioner was paid by the United States or an agency thereof.

III.

Assignment of Errors

The Petitioner assigns as errors the following acts and omissions of the Tax Court of the United States:

1. The making and entry by the Tax Court of the United States of its decision of January 15, 1959.

2. The conclusion of the Tax Court of the United States that Petitioner was paid by the United States or an agency thereof and his wages are not exempt from taxation under Section 911 (A) 2.

Wherefore, your petitioner prays that the United States Court of Appeals for the Ninth Circuit review the decision of the Tax Court of the United States of January 15, 1959, and reverse the determinations therein made.

/s/ RALF H. ERLANDSON,
Attorney for Petitioner.

Duly Verified.

Notice of Filing and Affidavit of Service by Mail Attached.

[Endorsed]: T.C.U.S. Filed March 26, 1959.

[Title of Court of Appeals and T. C. Docket 65621.]

DESIGNATION OF CONTENTS OF RECORD
ON REVIEW

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit, and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit the original files, documents, and records in the above entitled cause in connection with the Petition for Review heretofore filed by the taxpayer:

1. Pleadings before the Tax Court as follows:
 - a. Petition.
 - b. Amended Answer.
2. The findings of fact and opinion of the Tax Court.
3. The decision of the Tax Court.
4. The Petition for review.
5. From the official transcript of oral testimony, that testimony of Mr. George Y. Erlandson which appears on pages 11 to 13 inclusive; 28 to 38 inclusive; 47 to 48 inclusive, and 54.
6. Exhibits No. 1-A, 2, and 6 (1) (2) and (3).
7. Stipulation of facts.
8. Motion to file documents.
9. This designation of contents of record on review.

/s/ RALF H. ERLANDSON,

Attorney for Petitioner.

Affidavit of Service by Mail Attached.

[Endorsed]: T.C.U.S. Filed March 26, 1959.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 12, inclusive, constitute and are all of the original papers as called for by the "Designation of Contents of Record on Review" and "Designation of Additional Portions of Record on Review", including Exhibit 1-A, attached to the Stipulation of Facts, and Petitioner's exhibits 2 and 6 (1), (2) and (3), admitted in evidence, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 14th day of April, 1959.

[Seal] /s/ HOWARD P. LOCKE,

Clerk, Tax Court of the United
States.

[Endorsed]: No. 16458. United States Court of Appeals for the Ninth Circuit. George Y. Erlandson, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed: April 27, 1959.

Docketed: May 8, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

Docket No. 16458

GEORGE Y. ERLANDSON, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS

Comes now George Y. Erlandson, the petitioner herein, by his attorney, Ralf H. Erlandson, and hereby asserts the following errors which he intends to urge on review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States of the above cause entered on January 15, 1959.

1. The Tax Court erred in that it concluded that Petitioner was paid by the United States or an Agency thereof, and his wages are not exempt from taxation under Section 911 (A) 2.

/s/ RALF H. ERLANDSON,
Attorney for Petitioner.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 15, 1959. Paul P. O'Brien, Clerk.

United States Court of Appeals
For the Ninth Circuit

Docket No. 16458

GEORGE Y. ERLANDSON, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION OF CONTENTS OF RECORD
ON REVIEW

Comes now George L. Erlandson, the Petitioner herein, by his attorney, Ralf H. Erlandson, and adopts the Designation of Contents of Record on Review as heretofore submitted to the Clerk of the Tax Court of the United States as his designation of contents of record on review in the above matter.

/s/ RALF H. ERLANDSON,
Attorney for Petitioner.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 15, 1959. Paul P. O'Brien, Clerk.

16458

United States
COURT OF APPEALS
for the Ninth Circuit

GEORGE Y. ERLANDSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S BRIEF

FILED

AUG - 8 1959

PAUL P. O'BRIEN, CLERK

ERLANDSON & ROOK,
1108 Main Street,
Milwaukie, Oregon,
Attorneys for Petitioner.

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United States
COURT OF APPEALS
for the Ninth Circuit

GEORGE Y. ERLANDSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S BRIEF

PETITIONER'S BRIEF

Petition for review from a decision of the United States Tax Court.

JURISDICTION OF THE COURT

The Tax Court had jurisdiction by virtue of the provisions of Sections 6213 and 7442 of the Internal Revenue Code of 1954.

The United States Court of Appeals for the Ninth Circuit has jurisdiction to review the decision of the Tax

Court pursuant to the provisions of Section 7482 and 7483 of the Internal Revenue Code of 1954.

STATEMENT OF CASE

This case involves deficiency in income tax for the calendar year 1954 in the amount of \$1,960.38 for Petitioner, George Y. Erlandson.

The Petitioner has alleged that the Commissioner erred in including wages of \$10,299.97 received by Petitioner as compensation for personal services. The Commissioner contended that such compensation for services is includible in gross income in accordance with the provisions of Section 61(a) of the Internal Revenue Code of 1954. The petitioner contended that such compensation for services is excludible from gross income under the provisions of Section 911(a)(2) of the Internal Revenue Code of 1954.

The case was tried before Hon. Bruce M. Forrester, at Portland, Oregon, on March 4th, 1958. The issues on trial were (1) was the Petitioner present in foreign countries at least 510 full days in the eighteen consecutive month period from October 16, 1952, to April 15, 1954? and, (2) was the Petitioner paid by the United States or an agency thereof?

The original objection of the government to the Petitioner's position was on Issue 1 above and most of the evidence adduced at the trial dealt with that issue. The government has since conceded that issue however, and the only issue on appeal is Issue 2 above.

The petitioner, a U. S. Citizen, was employed on a U. S. owned merchant vessel during the times in question. The ship was operated by the Pacific Far East Line, Inc., under a general agency agreement. The National Shipping Authority of the Maritime Administration, U. S. Department of Commerce reserved to itself certain authority under the general agency agreement. It provided funds to the Pacific Far East Line, Inc., for operational expenses including wages of the seamen. Under the terms of the shipping articles, the Petitioner was employed and paid by the Master of the vessel. The checks paid to Petitioner for his services were drawn upon an account of Pacific Far East Line, Inc., in the Bank of America, and were signed by Pacific Far East Line, Inc., as drawer. The Pacific Far East Line, Inc., received credit for all officer and crew expenses including wages, but this credit could be denied upon a finding of wilful contravention of any existing instructions. The terms and conditions of the Petitioner's employment were determined in accordance with a collective Bargaining agreement between Pacific Far East Line, Inc. and the Master, Mates, and Pilots Local 90.

The tax court found that the Petitioner was paid by the United States or an agency thereof and from this decision, the Petitioner is here seeking review.

The foregoing statement is based upon the stipulation of facts (Tr 9), transcript of proceeding (Tr 11 to 26 inclusive), and upon exhibits No. 1-A, 2, and 6 (1) (2) and (3).

ISSUE ON REVIEW

Was the Petitioner paid by the United States or an Agency thereof so as not to come under the exemption provision of Section 911 (a)(2) of the Internal Revenue Code of 1954.

ARGUMENT

We are dealing with a fiction in the matter of whether the Petitioner was paid by the United States or an agency thereof. It is a fiction because the *fact* is that the Petitioner was paid by the Pacific Far East Line, Inc. Then the problem arises as to question of *law* as to who paid the Petitioner. There are interweaving relationships here involving the seaman and the Master, to whom he was alone responsible; the seaman and Pacific Far East Line, Inc.; the seaman and the National Shipping Authority which was to bankroll the operation but with whom the seaman had no dealings; we must consider what effect on the seaman's rights a contract between the employer (Pacific Far East Line, Inc.) of his employer (the Master) and the National Shipping Authority would have; what significance to the relationship of the seaman and the United States that the union contract between the Master, Mates and Pilots and the Pacific Far East Line, Inc. would have; the legal effect of the actual employment contract, in this case between the seaman and the Master; these and other relationships are present for us to consider in determining whether as a matter of *law* the petitioner-

seaman was paid by the United States. Because without contradiction in the record he was paid by Pacific Far East Lines, Inc.

Now though he was paid by the Pacific Far East Line, Inc., he was employed by the Master (Exhibit 2). In the case of *Cosmopolitan Shipping Co. v. McAllister*, 337 US 783, where for tort purposes the seaman was held to be an employee of the United States, it said across the top of the articles "YOU ARE BEING EMPLOYED BY THE UNITED STATES". In this case there was no such agreement or understanding. In fact, this third party (so far as Petitioner is concerned) agreement called the "general agency agreement" clearly infers that the seaman are not to be agents or employees of theirs. (Paragraph (d), page two of Exhibit 1-A). These two third parties even agree that where Pacific Far East Line, Inc. (one of the parties), and the Master (not a party) are to be agents and employees of the U. S. and never mention any such status for seamen, that the Master shall have and exercise full control, responsibility, and authority with respect to the manning of the vessel.

Since the United States has agreed with its contractor that full responsibility is on the Master, it would appear that there is no agency in regard to this specific aspect, i.e., "manning" of the vessel, at least so far as such a third party contract can have effect on these parties. This would indicate that the seaman was (1) employed by the Master, (2) that the Master was for these purposes an independent contractor (for al-

though there were general statements about agency relationship between the Master and the United States, the specific contractual arrangements, as here, control as to what the relationship was in fact and in law).

The tax court relying on the case of *Robert W. Teskey*, 30 T.C. 456, has ruled that the Petitioner was paid by an agency of the United States. There are several factors here in addition to the basic principle of need for taxes for government purposes which could provide an impetus for such a decision (1) The United States owns the ship, (2) the Agreement to furnish money to the "general agent", (3) the power retained in the contract to exercise control over the general agent, (4) the power retained in the contract to issue regulations affecting the ship, (5) the statement in the contract that the Master is an agent of the U. S., (6) the fact that the Navy issued regulations affecting the movement of the ship (7) that the actual use of the vessel was for government purposes but the most important of these, since it is the only plausible one, is the factor of the United States bank-rolling this operation. They not only agreed to furnish money to the general agent for purposes including paying wages to the seaman, and the general agent agreed to pay the seamen, but the general agent actually did pay them and the United States actually did furnish the funds.

But what sort of a fund was this? The evidence before the Court does not comprehensively show but there are several factors to be considered. From the general agency agreement, it appears that it was contemplated by the parties that funds other than those

specifically provided for wages (if any there were) would be spent by Pacific Far East Line, Inc., for the payment of wages since the United States agreed to credit Pacific Far East Line, Inc., for any such funds paid. The control of this money appeared to be exclusively in the Pacific Far East Line, Inc., and they spent it at their discretion under the very general directions of the United States to do the work in a workmanlike manner. If they did not do the work properly, the United States could refuse to give them more money under the agreement. This is the case whether or not they paid the seamen. The seamen's remedy in case of non-payment is against the Master. *Everett, et al v. U. S., et al*, 277 F 256. The money once paid over to Pacific Far East Line, Inc., was theirs to do with as they pleased. They had general agreements to spend it in a certain manner, but if they did not do so, and did not pay the seamen, then the remedy of the United States would be: (1) action for breach of contract, (2) withhold further payments under the contract and/or (3) an action on the bond. There was no trust arrangements set up in the general agency agreement and the relationship so far as the manning of the vessel was concerned was not a trust arrangement.

The Tesky case is not *stare decisis* here. The Court there did not concern itself with the problems created by the relationships. The only concern seemed to be one of where the money came from. Whether the many factors necessary to an adequate decision of the question were even presented to the Tax Court is unknown to the Petitioner, but logically, the reasoning developed in that

case is not strong authority for any proposition. If the fact that the money by which an individual is paid can be traced is determinative of who pays the individual, then the Tesky case certainly should stand. We do not think that is the case.

We have a case then where some facts point in either direction. The seaman is confronted with a situation where according to the Tax Court, he is paid by the United States and yet (1) he cannot collect his wages from them if he is not paid, (2) the ship on which he was employed is operated in substantially the same manner as any other ship not owned by the United States, by Pacific Far East Line, Inc., a company in the business of running ships and not an agency of the United States, (3) he is under the sole and singular control of the Master of the vessel who is not an agency of the United States, (4) he was paid in cash and by check by Pacific Far East Line, Inc. with checks drawn by Pacific Far East Line, Inc., in their bank account, (5) the United States did not have to compensate Pacific Far East Line, Inc., if the company followed certain practices, (6) the control of the United States exercised over the vessel was that control it exercised over all vessels owned or not, (7) he would have to look to his employer, the Master, for his wages if not paid, (8) the United States tried to place full responsibility on the Master for the crew in its contract with Pacific Far East Line, Inc., and in fact had a cause of action against the company if any other fact developed, (9) the United States had agreed to credit Pacific Far East Line, Inc., for monies it spent for wages of seamen;

—these and other factors face the Petitioner who, entitled by the terms of the statute to this exemption, is here seeking it.

Respectfully submitted,

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Attorneys for Petitioner.

In the United States Court of Appeals
for the Ninth Circuit

GEORGE Y. ERLANDSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court
of the United States

BRIEF FOR THE RESPONDENT

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FILED

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16,458

GEORGE Y. ERLANDSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court
of the United States

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion below (R. 28-35) were not reported.

JURISDICTION

This petition for review (R. 37-39) involves federal income taxes for the taxable year 1954. On December 14, 1956, the Commissioner of Internal Revenue mailed to the taxpayer notice of deficiency in the total amount of \$1,960.38. (R. 5-6.) Within ninety days thereafter and on January 23, 1957, the taxpayer filed a petition with the Tax Court for a

redetermination of that deficiency under the provisions of Section 6213 of the Internal Revenue Code of 1954. (R. 3-8.) The decision of the Tax Court was entered on January 15, 1959. (R. 36.) The case is brought to this Court by a petition for review filed March 26, 1959. (R. 37-39.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the Tax Court correctly held that wages earned by the taxpayer while serving aboard a ship owned by the United States and operated by a private shipping firm under a general agency contract were paid by the United States or an agency thereof, and hence were not tax-exempt under Section 911 (a) (2) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 911. EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.

(a) *General Rule.*—The following items shall not be included in gross income and shall be exempt from taxation under this subtitle:

* * * *

(2) *Presence in foreign country for 17 months.*—In the case of an individual citizen of the United States, who during any period of 18 consecutive months is present in a foreign country or countries during at least 510 full days in such period, amounts received from sources without the United

States (except amounts paid by the United States or an agency thereof), if such amounts constitute earned income (as defined in subsection (b)) attributable to such period; * * *

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 911.)

STATEMENT

Most of the facts bearing upon the question on appeal were stipulated (R. 9-10) and such facts, as recited by the Tax Court (R. 28-34), may be summarized in the following manner:

In January 1952, the taxpayer signed shipping articles at Portland, Oregon, to serve as Second Officer aboard the M/V Jumper Hitch. (R. 29.)

The United States of America owned the Jumper Hitch. Through and by the Director, National Shipping Authority of the Maritime Administration, Department of Commerce, the United States entered into a general agency agreement for the operation of the ship with Pacific Far East Line, Inc. (R. 29.) This Service Agreement, dated April 16, 1951, was contract number MA-82-GAA, and in part provided the following (R. 29-33):

This Agreement, made as of April 6, 1951, between the United States of America (herein called the "United States") acting by and through the Director, National Shipping Authority of the Maritime Administration, Department of Commerce, and Pacific Far East Line, Inc., a corporation organized and existing under

the laws of Delaware, (herein called the "General Agent"):

* * * *

Article 1. Appointment of General Agent. The United States appoints the General Agent as its agent and not as an independent contractor, to manage and conduct the business of the vessels assigned to it by the United States from time to time and accepted by the General Agent.

Article 2. Acceptance of Appointment. The General Agent accepts the appointment and undertakes and promises so to manage and conduct the business for the United States, in accordance with such directions, orders or regulations not inconsistent with this Agreement as the United States has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided, of such vessels as have been or may be by the United States assigned to and accepted by the General Agent for that purpose.

Article 3. Duties of the General Agent. For the account of the United States, in accordance with such directions, orders, regulations, forms and methods of supervision and inspection as the United States may from time to time prescribe (or in the absence of such directions, orders, regulations, forms and methods of supervision and inspection, in accordance with reasonable commercial practices and/or the use of customary commercial forms), in an economical and efficient manner, and exercising due diligence to protect and safeguard the interests of the United States in connection with the duties prescribed in this Agreement and without preju-

dice to its rights under Article 6 hereof, the General Agent (solely as agent of the United States and not in any other capacity) shall:

* * * *

(b) Collect, deposit, remit, disburse and account for all monies due the United States arising in connection with activities under or pursuant to this Agreement, and to the extent disbursements made by the General Agent pursuant to this Agreement are recoverable from insurance, the General Agent shall take such steps as may be appropriate to effect such recovery for the account of the United States.

* * * *

(d) Procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the manning, navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions of the General Agent's collective bargaining agreements, if any. The officers and members of the crew shall be subject only to the orders of the Master. All such persons

shall be paid in the customary manner with funds provided by the United States hereunder.

* * * *

(f) Furnish and maintain during the period that any vessel is assigned and accepted by the General Agent under this Agreement, at its own expense, a bond with sufficient surety in such amount as the United States shall determine such bond to be approved by the United States as to both sufficiency of surety or sureties and form, and to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the General Agent contained in this Agreement, including without limitation of the foregoing the condition faithfully to account to the United States for all funds collected and disbursed and funds and property received by the General Agent or its sub-agent. The General Agent may, in lieu of furnishing such bond, pledge direct or fully guaranteed obligations of the United States of the cash value of the penalty of the bond under an agreement satisfactory in form to the United States.

No monies or slop chest property of the United States shall be advanced or entrusted by the General Agent to a Master, purser or any other member of the ship's personnel unless such person is under a bond indemnifying the United States against loss of such monies or property caused solely or in part by the dishonesty or lack of care of any such person in the performance of

the duties of any position covered by the bond.

(g) (1) Keep books, records and accounts (which shall be the property of the United States) relating to the activities, maintenance and business of the vessels covered by this Agreement in such form and under such regulations as may be prescribed by the United States; * * *

There is an addendum dated October 5, 1951, to the above agreement providing, in part, the following (R. 33-34):

Article 5. Disbursements. * * * The United States shall also advance funds to the General Agent to provide for, and the General Agent shall receive credit for, all crew expenditures accruing during the term hereof in connection with the vessels assigned hereunder, including, without limitation, expenditures on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, internment, travel, loss of personal effects, maintenance and cure, vacation allowances, damages or compensation for death or personal injury or illness, insurance premiums, Social Security taxes, state unemployment insurance taxes and contributions made by the General Agent to a pension or welfare fund with respect to the period of this Agreement and in accordance with a pension or welfare plan in effect on the effective date of this Agreement or which, pursuant to collective bargaining agreements, may become effective during the period of this Agreement with respect to officers and members of the crew of said vessels who are or may become entitled

to benefits under such plan, or any other payment required by law.

It has been orally stipulated that the United States provided the general agent with funds for the wage payments due the officers and crew of the Jumper Hitch from the Civil Operations Revolving Fund created by Congress in 1951. Third Supplemental Appropriation Act, 1951, c. 121, 65 Stat. 52, 59. (R. 34.)

In April 1954, the taxpayer was paid \$10,299.97 by the United States Government's general agent, Pacific Far East Line, Inc., for his services performed aboard the Jumper Hitch. (R. 34.)

Following its decision in *Teskey v. Commissioner*, 30 T. C. 456 (reproduced in the Appendix, *infra*), the Tax Court held that the wages received by the taxpayer were "amounts paid by the United States or any agency thereof", within the meaning of the exception clause of Section 911(a)(2), and that therefore his wages are not exempt from taxation under that section. (R. 34-35.)¹

SUMMARY OF ARGUMENT

Section 911(a)(2) of the 1954 Code provides that income earned abroad by a United States citizen shall be excluded from his gross income if he has been present in a foreign country for a specified period, but excepts from this exemption "amounts paid by the United States or any agency thereof."

¹ The Commissioner conceded below that the taxpayer was present in a foreign country, as prescribed by Section 911(a)(2), Internal Revenue Code of 1954. (R. 29.)

It is clear, as the Tax Court held, that the taxpayer's salary as an officer aboard the ship, Jumper Hitch, was paid by the United States or an agency thereof and, accordingly, that the taxpayer may not avail himself of the benefits of the section.

The record establishes that the vessel was owned by the United States and operated during the year in question, 1954, by Pacific Far East Line, Inc., as a general agent of the United States. As provided in the agency agreement, the taxpayer was paid with United States funds, advanced to Pacific for the specific purpose of meeting vessel operating expenses such as wages. In this respect, Pacific was a mere conduit for the payment of such wages by the United States to the taxpayer. Under the agreement the sums advanced were not held by Pacific under any color of title other than as agent for the United States. Pacific's compensation for the operation of the vessel was not derived from the funds so advanced, but was separately paid on a monthly basis.

The broad language of Section 911(a)(2) does not even require that the taxpayer be an employee of the United States, but merely that he be "paid by the United States." Even assuming otherwise, however, it would appear that he was in fact such an employee. The statutory provisions creating the fund from which the United States drew the sums advanced to Pacific characterizes seamen like the taxpayer as "employees" of the United States; and the Supreme Court has held (*Cosmopolitan Co. v. McAllister*, 337 U.S. 783) that a seaman who was hired pursuant to an agreement substantially identical to

the agreement in the present case was an employee of the United States.

The Tax Court's decision is in accord with its own prior decisions in similar cases (see *Teskey v. Commissioner*, 30 T.C. 456) and with a revenue ruling on the issue. The taxpayer's argument ignores the plain terms of the agency agreement, which expressly obligated the United States to pay the wages in question and the stipulated fact that the funds out of which they were paid were provided by the United States. The taxpayer does not (and cannot) point to any authority which supports his position.

ARGUMENT

The Taxpayer Was Paid By the United States, Or An Agency Thereof, and, Accordingly, His Income Is Not Exempt From Taxation Under the Provisions of Section 911 of the Internal Revenue Code of 1954

Section 911(a)(2) of the Internal Revenue Code of 1954, *supra*, states that amounts constituting earned income from sources without the United States shall be excluded from the gross income of an individual citizen of the United States who establishes that he has been present in a foreign country for at least seventeen out of eighteen consecutive months, *provided* that such amounts are not paid by the United States or an agency thereof.² A brief de-

² The section was first enacted as Section 116(a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, for the purpose of relieving citizens living abroad of the double burden of foreign and domestic tax upon the same income. S. Rep. No. 665, 72d Cong., 1st Sess. (1932) (1939-1 Cum. Bull. (Part 2) 496, 518). While the Senate version of the 1932

scription of the circumstances under which the taxpayer was employed and paid here seems sufficient to establish that he was "paid by the United States or an agency thereof," and, accordingly, is not entitled to the benefits of this section.

The taxpayer was employed on the vessel Jumper Hitch, owned by the United States and operated during the year in question here, 1954, by Pacific Far East Line, Inc., under an agreement entered into in 1951 with the Director, National Shipping Authority of the Maritime Administration, Department of Commerce. (R. 29.) Under the terms of the agreement, Pacific was appointed as an "agent and not an independent contractor, to manage and conduct the business" of the United States. (R. 30.) And the agreement set forth in some detail the operational duties and responsibilities of the agent. (R. 30-33.) One of the requirements was that Pacific procure a master to actually operate the ship (who was to be an agent and employee of the United States) and make available to the master for hire by him officers and men to fill the complement of the ship. (R. 31.)

Revenue Act struck out the section altogether, S. Rep. No. 665, *supra*, the provision was restored at conference with the amendment that the exclusion from income would not apply to amounts paid by the United States. H. Conference Rep. No. 1492, 72d Cong., 1st Sess. (1932) (1939-1 Cum. Bull. (Part 2) 539, 543). Apparently, this amendment, with which we are concerned here, was intended to prevent exemption from United States tax for citizens who also paid no foreign tax. S. Rep. No. 665, *supra*. See *Sverdrup v. Commissioner*, 14 T.C. 859. The record does not show, nor does the taxpayer claim, that he paid any foreign tax on the income in question.

The officers and crew were to be hired through usual channels of commercial practice, were to be subject only to the orders of the master, and, most important in terms of the present case, were to be "paid in the customary manner with funds provided by the United States." (R. 31-32.)

The agreement specifically provided that the United States shall "advance funds to the General Agent to provide for * * * expenditures on account of wages." (R. 33.) The parties have orally stipulated (R. 34) that the funds so provided for the wage payments due officers and crew of the Jumper Hitch are from the Civil Operations Revolving Fund created by Congress in 1951 for the express "purpose of carrying out vessel operating functions of the Secretary of Commerce." Third Supplemental Appropriation Act, 1951, c. 121, 65 Stat. 52, 59 (46 U.S.C. 1952 ed., Sec. 1241(a)).

Under these facts, the Tax Court's finding (R. 34) that the taxpayer was paid by the United States or an agency thereof seems inescapable.³ While it may

³ It is, of course, obvious that the National Shipping Authority of the Maritime Administration, Department of Commerce, is an agency of the United States within the meaning of the statute. For simplicity, references to the United States herein include this agency.

Since the funds in question were defrayed by the United States through an established agency (the Commerce Department), there was no need for the Tax Court to reach the question whether Pacific—which served as a conduit of the funds under the general agency contract—was also "an agency" of the United States within the purview of the exception clause of Section 911(a). Suffice it to note that even if, as the taxpayer contends, Pacific was the real payor,

be true that the taxpayer's salary checks were issued by Pacific as maker (R. 26), in this capacity, as in all other connections, Pacific was acting as an agent for the United States in distributing funds advanced by the United States from the Civil Operations Revolving Fund. In other words, Pacific was a mere conduit for the payment of wages.

The fact that the wages of the crew were to be paid from United States funds also fits in with general financial arrangements of the agency agreement. All the funds for expenditure of every kind made by the general agent in "performing, procuring, or supplying the services, facilities, stores, supplies, or equipment" as required under the agency agreement were to be advanced by the United States. (Art. 5 of the agency agreement, Ex. 1-A.) Consistent with the concept of Pacific as a conduit for wage payments, all funds advanced for wages and other expenses were used by Pacific solely for these purposes. Pacific was not an independent contractor under the agreement (R. 30) and did not extract its profits for operation of the vessel from the sums advanced by the United States for payment of wages and other expenses. Article 4 of the agreement (Art. 4 of Ex. 1-A) provides that compensation shall be paid the general agent monthly in "fair and reasonable amount" as determined by the United States.

then it should likewise be treated as such an "agency" (*Sverdrup v. Commissioner*, 14 T.C. 859; Treasury Regulations under the 1954 Code, Sec. 1.911(a)(1))—particularly since there is no showing that the payment was subjected to a foreign tax—and the Tax Court's decision should therefore nevertheless be affirmed.

As the Tax Court notes (R. 35), the case of *Teskey v. Commissioner*, 30 T.C. 456, involving almost identical facts, is authority for the decision here. A copy of the Tax Court decision in that case is set forth as the Appendix to this brief. See also Rev. Rul. 58-4, 1958-1 Cum. Bull. 687, quoted extensively in the *Teskey* case. The decision by the Tax Court in *Sverdrup v. Commissioner*, 14 T.C. 859, also is in point. There it was held that the taxpayer's distributive share of partnership income, which had been earned on construction contracts with the United States, was paid by the United States, the court reasoning that the intervention of the partnership between the flow of such income from the United States to the taxpayer effected no substantial change in the actual result.

The broad scope of the language in Section 911 (a) (2) does not make it necessary that a taxpayer be an employee of the United States or an agency thereof in order to be "paid by" the United States. *Sverdrup v. Commissioner, supra*. But, in the present case, to add to what we have already argued, it appears that the taxpayer was in fact such an employee. For example, the Third Supplemental Appropriation Act, 1951, *supra*, which established the "Vessel Operations Revolving Fund" from which wage and other expenses are advanced to the general agent, refers to "seamen employed through general agents as employees of the United States, who may be employed in accordance with customary commercial practices in the maritime industry." [Emphasis supplied.] This reference seems applicable to the

taxpayer. He was paid by funds provided by the Act (R. 34), employed through a general agent, and hired, under the agreement, in "accordance with the customary practices of commercial operators" (R. 31).⁴ The Act of March 24, 1943, c. 26, 57 Stat. 45, Sec. 1 (50 U.S.C. Appendix, 1952 ed., Sec. 1291) (referred to in *Cosmopolitan Co. v. McAllister*, 337 U.S. 783, as the "Classification Act"), whose provisions were made applicable to seamen by the 1951 Act, itself, in setting out limitations on the employment rights of seamen, refers to those "employed on United States * * * vessels as employees of the United States through the War Shipping Administration."

The status of seamen such as the taxpayer has been thoroughly analyzed in *Cosmopolitan Co. v. McAllister*, 337 U.S. 783. There, a general agent was engaged under a standard service agreement by the War Shipping Administration⁵ to operate a vessel owned by the United States. That agreement was almost identical to the agreement here and *was* identical, even to the numbering of the paragraphs, to Article 3(d) (R. 31-32) of the present agreement which deals with the matter of hiring officers and crew. *Cosmopolitan Co. v. McAllister*, *supra*, p. 796.

⁴ The reference to "seamen" in the 1951 Act is to officers and members of the crew. Act of March 24, 1943, c. 26, 57 Stat. 45, Sec. 1 (50 U.S.C. Appendix, 1952 ed., Sec. 1291).

⁵ The National Shipping Authority of the Maritime Administration is the successor to the War Shipping Administration. See Note to 50 U.S.C. Appendix, 1952 ed., Sec. 1291, and Note to 46 U.S.C., 1952 ed., Sec. 1111.

The issue in the *Cosmopolitan* case concerned the rights of an injured seaman to sue for compensation, and this question, in turn, partially dependent upon who was the seaman's employer, the general agent or the United States. The Court held that the terms of the agreement—referring specifically to the fact that the crew was paid, as here, from funds advanced by the United States to the general agent—made it clear that the seaman was an employee of the United States.⁶

This decision would seem dispositive of the issue here. The taxpayer, hired under substantially the same terms and conditions as was the seaman in the *Cosmopolitan* case, was also an employee of the United States, and, as such, was necessarily "paid by" the United States or an agency thereof within the meaning of Section 911(a)(2). Even assuming, *arguendo*, that the taxpayer was not an employee of the United States, it is clear from the undisputed facts that he was "paid by" the United States.

⁶ Although, as the taxpayer notes in his brief ,p. 5), the shipping articles in the *Cosmopolitan* case had stamped on them, "You Are Being Employed by the United States", this fact was not the only consideration which influenced the Court's decision. The opinion shows that the Court looked to all facets of the seaman's employment.

CONCLUSION

It is respectfully submitted that the decision of the Tax Court should be affirmed.

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
HARRY BAUM,
CARTER BLEDSOE,
Attorneys,
Department of Justice,
Washington 25, D. C.

SEPTEMBER, 1959.

APPENDIX

TAX COURT OF THE UNITED STATES

Docket No. 63852

ROBERT W. TESKEY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

(Filed May 29, 1958)

A citizen of the United States, employed as a radio operator on a vessel owned by an agency of the United States and operated by the United States under a contract with a private shipping firm as agent, in shuttle service between Korea and Japan during the Korean War emergency, was paid by a private shipping line as agent of the United States from funds provided specifically for that purpose by the United States. *Held*, such compensation constitutes an amount paid by the United States or any agency thereof within the meaning of section 116 (a) I. R. C. 1939, and section 911 (a) I. R. C. 1954, and is not excludable from gross income even though the employee may be physically present in a foreign country or countries for 510 full days or more of an 18-month period to which such wages are attributable. The Commissioner is sustained in his determination of the deficiencies.

Thomas J. Beddow, Esq., for the petitioner.

Neil J. O'Brien, Esq., for the respondent.

The Commissioner has determined deficiencies in petitioner's income tax for the years 1953 and 1954

in the respective amounts of \$2,366.91 and \$1,278.04. The explanation in the deficiency notice of the deficiency for 1953 is as follows:

You have failed to show that for the year 1953 you qualified as a bona fide resident of a foreign country, within the meaning of Section 116 (a) of the Internal Revenue Code, for an uninterrupted period which includes an entire taxable year. You have also failed to show that your foreign employment was part of a period of 18 consecutive months during which you were present in a foreign country or countries for at least 510 full days in such period. "Therefore, your wages of \$10,049.76 constitute taxable income."

The deficiency for 1954 is also due to the same kind of adjustment, except in smaller amount, and it is explained in the deficiency notice in a similar manner.

The petitioner assigns error as to the determination of the Commissioner for each of the taxable years and contends his compensation was exempt from taxation.

At the hearing, respondent's counsel stated that the Commissioner no longer contended that petitioner did not reside in a foreign country for the length of time required by the statute but that he does contend that petitioner received his compensation from the United States or one of its agencies and that hence the income of petitioner is not exempt under the statutes relied upon. That is the only issue presented for our decision.

There is no dispute as to the amount of compensation which petitioner received in each of the taxable years.

FINDINGS OF FACT.

Most of the facts have been stipulated and the stipulated facts are incorporated herein by this reference.

Petitioner Robert W. Teskey resides at Bethesda, Maryland, and his income tax returns for the years 1953 and 1954 were filed with the district director of internal revenue at Baltimore, Maryland.

Between January 16, 1952, and February 2, 1954, petitioner was a seaman in the Merchant Marine Service of the United States serving as radio operator aboard the motor vessel *Rose Knot*. *Rose Knot* was owned by the United States of America, represented by the Maritime Administration, Department of Commerce. The United States of America (acting by and through the Director, National Shipping Authority of the Maritime Administration) on March 19, 1951, entered into General Agency Agreement MA-56-GAA with Pacific-Atlantic S. S. Co., sometimes hereinafter referred to as Pacific-Atlantic.

Under MA-56-GAA the United States appointed Pacific-Atlantic as its agent, and not as an independent contractor, to manage and conduct the business of the vessels assigned to it for the business and account of the United States and in accordance with the directions, orders, supervision, and inspection as the United States might from time to time prescribe.

The Director, National Shipping Authority of the Maritime Administration, authorized assignment of *Rose Knot* to Pacific-Atlantic. The itinerary of *Rose Knot* was directed by the United States (acting through the Military Sea Transportation Service). *Rose Knot* was used in the shuttle service between ports in Japan and ports in Korea during the Korean War emergency. *Rose Knot* was used to transport

dry commodities such as tanks, vehicles, and ammunition between Japan and Korea.

By the terms of the General Agency Agreement, Pacific-Atlantic was required to procure for *Rose Knot* a master, who was to be an agent and employee of the United States and who was to exercise full control with respect to the manning, navigation, and management of the vessel. Pacific-Atlantic was further required to procure through the usual channels, and make available to the master for engagement, officers and men required by the master to fill the complement of the vessel. The agreement did not carry any provision which said that the officers and crew required to fill the complement of the vessel would be employees of the United States. The officers and crew were subject only to the orders of the master.

On or about January 16, 1952, petitioner was procured out of union hiring hall by Pacific-Atlantic, signed shipping articles of agreement, and was thereupon engaged by the master of *Rose Knot* for service as its radio operator. The terms, pay provisions, and conditions of petitioner's employment were fixed by and according to the union agreement with Pacific-Atlantic.

Petitioner signed subsequent shipping articles of agreement for service aboard *Rose Knot* as its radio operator on October 23, 1952, and July 18, 1953, which articles extended his employment to approximately February 2, 1954.

Rose Knot sailed from Portland, Oregon, on January 22, 1952, and arrived at Yokohama, Japan, on February 18, 1952. *Rose Knot* sailed from Yokohama, Japan, on January 15, 1954, and arrived at Portland, Oregon, on February 1, 1954. Between February 18, 1952, and January 15, 1954, *Rose Knot*

was in shuttle service between ports in Japan and ports in Korea, except for a trip from Yokohama, Japan, to Naha, Okinawa, and return, covering the period December 11, 1953, to December 20, 1953.

While engaged as radio operator aboard *Rose Knot*, petitioner was paid for his services either by check of Pacific-Atlantic or in cash from funds provided therefor by the United States. The service agreement provided that the United States would advance funds to Pacific-Atlantic to provide for the expenses incurred by it in operating the vessel, and that Pacific-Atlantic would be paid fair and reasonable compensation for its services, including in such compensation administration and general expense, advertising expense, taxes, and other indirect expenses.

From payment made to petitioner, Pacific-Atlantic withheld Federal unemployment, social security, and Federal income taxes. Nothing was withheld from such compensation in respect of Federal retirement benefits. Pacific-Atlantic paid unemployment taxes on petitioner's compensation, as well as any pension or welfare fund contributions required by Pacific-Atlantic's collective bargaining agreements. From a revolving fund established by Pub. L. No. 45, 82d Cong., 1st Sess., the United States provided the funds which it placed in a special and joint bank account from which Pacific-Atlantic could make withdrawals for the purposes designated in the General Agency Agreement. The General Agency Agreement required the agent, Pacific-Atlantic, to account for all moneys disbursed. The agreement required the agent to keep books and records (which were to be the property of the United States) and to file financial statements according to the directions of the United States.

The shipping articles stated that the United States or one of its agencies was the owner of *Rose Knot*.

The moneys used to pay the wages earned by the petitioner while engaged as radio operator aboard the *Rose Knot* belonged to and were the funds of the United States or an agency thereof immediately prior to payment to petitioner. The wages earned by petitioner while engaged as radio operator aboard the *Rose Knot* were amounts paid by the United States or an agency thereof.

OPINION.

BLACK, *Judge*: For the taxable year 1953, petitioner claims that wages received from Pacific-Atlantic in the amount of \$10,049.76 are excludable from gross income under section 116 (a) (2), I. R. C. 1939. For the taxable year 1954, petitioner claims that wages received from Pacific-Atlantic in the amount of \$6,307.29 are excludable from gross income under section 911 (a) (2), I. R. C. 1954.

Respondent in his answer denied petitioner's claim generally and specifically alleged that petitioner's wages were paid by the United States or an agency thereof.

The sections of the statute above referred to, in substance, provide that income earned abroad by a United States citizen, who is present in a foreign country or countries for at least 17 months out of 18 consecutive months, shall be excluded from gross income. The exclusionary provision does not extend to "amounts paid by the United States or any agency thereof."

The notice of deficiency determined that sections 116 (a) (2) of the 1939 Code and 911 (a) (2) of the 1954 Code were not applicable because petitioner was not present in a foreign country or countries for at least 17 months out of 18 consecutive months.

This position has, however, now been abandoned by respondent.

In his answer to the petition filed, respondent, by way of an affirmative allegation, alleged that the compensation earned abroad by petitioner, during his presence in a foreign country or countries for 17 months out of any period of 18 consecutive months, was paid to him by the National Shipping Authority, Maritime Administration, Department of Commerce, an agency of the United States. Accordingly, the only issue in this case is whether the benefits of sections 116 (a) (2) of the 1939 Code and 911 (a) (2) of the 1954 Code are to be denied to the petitioner on the ground that the compensation reflected in his 1953 and 1954 returns represented "amounts paid by the United States or any agency thereof."

Both parties in their briefs discuss at considerable length the question as to upon whom the burden of proof lies. Petitioner takes the position that the burden of proof lies upon the Commissioner because he shifted his grounds as originally stated in his deficiency notice to another ground as alleged in his answer, to wit, that the compensation received by petitioner was paid to him by "the United States or any agency thereof." The Commissioner argues that the changing of his ground for the disallowance of the exemption from that of insufficient time spent abroad in earning the compensation, to that of the ground that petitioner's compensation was paid to him by "the United States or any agency thereof" has no effect on the burden of proof required in the case. Respondent cites many cases in support of his position. However, we think it is unnecessary to take up any time in discussing in this case upon whom the burden of proof lies.

The facts have been very fully stipulated, except as to one or two minor matters upon which oral testi-

mony was heard. So far as we can see there is no lack of facts to inform us fully as to how and by whom petitioner was employed and by whom he was paid. The facts, as we see them, are really not in dispute. Our task is to give consideration to these facts and determine whether petitioner was paid his compensation by the "United States or any agency thereof." If he was so paid, then he does not get the exemption provided by the statutes upon which he relies. If he was not paid by the "United States or any agency thereof" within the meaning of the applicable statutes, then the amounts of his compensation for both taxable years are exempt from taxation under the statutes relied upon.

We think that under the law and the facts the issue must be decided for the Commissioner. In Rev. Rul. 58-4, I. R. B. 1958-1, 45, the very question here involved was fully considered and ruled upon. The facts upon which that ruling was based are essentially the same as the facts in the instant case. This is shown by quoting from the ruling, pages 46, 47, as follows:

From January 26, 1954, to July 24, 1955, inclusive, a total of 545 days, the taxpayer lived in Korea and was employed on a shuttle ship which sailed between Korea and Japan. During such period the taxpayer was not within the United States or any possession thereof. The United States, represented by the Maritime Administration, was owner, or owner for the time being, of the ship on which the taxpayer was employed. * * *

The instant agreement appointed a shipping line as general agent under the contract and defined the duties of the general agent. Among these duties was the procurement of a master

who should be an agent and an employee of the United States. The general agent was required to procure and make available to the master, for engagement by him, the officers and men required by him to fill the complement of the vessel. This personnel was procured through usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions of the general agent's collective bargaining agreements, if any. All such personnel were paid by the general agent in the customary manner with funds provided by the United States for performing, procuring, or supplying services, and for paying all crew expenditures. Operating control of the ship was maintained by the United States through the ship's master.

Upon these facts it was ruled as follows:

Accordingly, it is held that wages paid by a private shipping line as general agent of the United States, from funds provided for that purpose by the United States, to a citizen of the United States as compensation for services performed on a vessel owned, or owned for the time being, by an agency of the United States and operated by the United States, are not excludable from gross income under the provisions of section 911 (a) (2) of the Code even though the employee may be physically present in a foreign country or countries for 510 full days or more of an 18 consecutive month period to which such wages are attributable. * * *

It will be noted that the foregoing ruling was as to the applicability of section 911 (a) (2) of the 1954 Code. That section is applicable to one of the

years here in question, the year 1954. Section 116 (a) (2) of the 1939 Code is applicable to the year 1953. However, it is essentially the same as section 911 (a) (2) of the 1954 Code and the foregoing internal revenue ruling is equally applicable to the taxable year 1953, as it is to 1954. There is no dispute between the parties on that score.

Petitioner, however, contends that the Commissioner's ruling in Rev. Rul. 58-4, I. R. B. 1958-1, 45, is not correct and should not be followed. Obviously, if this ruling is not correct, it should not be followed. It is well recognized that the Commissioner has no authority to make a ruling which is contrary to an act of Congress and if he does publish such a ruling the courts will not follow it. However, we do not believe that the internal revenue ruling to which we have made reference above is erroneous. It seems to us that it is a correct application of the law to the facts.

Since the United States through the Department of Commerce, Maritime Administration, National Shipping Authority, in satisfaction of its obligation paid wages to the petitioner, albeit payment was made by the United States through its agent, Pacific-Atlantic, the amounts thus received by petitioner were paid by "the United States or any agency thereof," and petitioner is, therefore, not entitled to the exemption-exclusion provided by the sections of the statutes to which reference has already been made.

Petitioner strongly maintains that he was never at any time an employee of the United States. Even if that fact be assumed to be correct, we do not think it would change the result. The sections of the statutes which are here applicable except from the exemptions provided, amounts paid by "the United States or any agency thereof." The language is

broad enough to exclude from the exemption provided in the statutes, amounts paid by the "United States or any agency thereof," even though the taxpayer to whom the payment is made is not, strictly speaking, an employee of the United States.

The crucial question is, was the payment made by "the United States or any agency thereof." Cf. *Leif J. Sverdrup*, 14 T. C. 859, 866, (1950). In the *Sverdrup* case, we held that the sum of \$36,279.30 received by the taxpayer as a member of a contracting firm was not exempt under section 116 (a) of the 1939 Code, even though the taxpayer was not an employee of the United States Government. The important thing was that the \$36,279.30 was paid by the United States Government. Among other things, we said:

It is significant that the words actually adopted in the amendment were broad. Neither the word "employees" nor the word "compensation" was used. Instead, the amendment as passed reads: "except *amounts paid* by the United States or any agency thereof." (*Italics supplied.*) Since the sum of \$36,279.30 here in question was such an amount, we hold that respondent properly determined that that amount was not excludable from petitioner's gross income in 1942.

We hold that the payments here in question were paid by "the United States or any agency thereof" and are not exempt from taxation. The Commissioner is sustained.

Decision will be entered for the respondent.

No. 16461 ✓

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

ARTHUR E. BAKER, DORIS M. BAKER,
JOHN L. ROACH and BETTIE JO ROACH,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

FILED

NOV 24 1959

No. 16461

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ARTHUR E. BAKER, DORIS M. BAKER,
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Transcript of Record

Appeal from the United States District Court for the
District of Arizona

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Doris M. Baker, John L. Roach and
Bettie Jo Roach.

In the United States District Court
for the District of Arizona

No. Civ. 2597 Phx.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

217.99 ACRES OF LAND, More or Less, Situate
in the County of Maricopa, State of Arizona;
ARTHUR E. BAKER, et al., and UNKNOWN
OWNERS,

Defendants.

COMPLAINT IN CONDEMNATION

1. This is an action of a civil nature brought by the United States of America at the request of the Secretary of the Air Force for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257); Sections 2663 and 9773 of Title 10, United States Code, which authorize the acquisition of land for military purposes; Section 505 of the Act of Congress approved September 28, 1951 (Public Law 155, 82nd Congress), which act authorizes acquisition of the

land, and the Act of Congress approved July 27, 1956 (Public Law 814, 84th Congress), which act appropriated funds for such purposes.

3. The use for which the property is to be taken is for military purposes.

4. The interest in the property to be acquired is the fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

5. The property so to be taken is described in the Exhibit A hereto attached.

6. The persons having or claiming an interest in the property whose names are now known are:

Tract No. H-800

Tacy Claggett Moyer, formerly Tacy Claggett, wife of C. H. Moyer.

Tract No. H-801

Arthur E. and Doris M. Baker, husband and wife.
John L. and Bettie Jo Roach, husband and wife.

7. The County of Maricopa, State of Arizona, and the State of Arizona may have or claim an interest in the property by reason of taxes and assessments due and exigible.

8. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the Plaintiff and such persons are made parties to the action under the designation "Unknown Owners."

Wherefore, the Plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

JACK D. H. HAYS,

United States Attorney for
the District of Arizona;

/s/ WILLIAM E. EUBANK,

Assistant U. S. Attorney.

Trial by jury of the issue of just compensation is demanded by Plaintiff.

EXHIBIT A

Tract No. H-800

The Southwest one-quarter of Section 3, Township 2 North, Range 1 West, Gila and Salt River Meridian, in the County of Maricopa, State of Arizona.

Except the West 1200.00 feet of said Southwest one-quarter.

Containing 85.59 acres, more or less, including 1.08 acres, more or less, in Glendale Avenue.

Tract No. H-801

Two parcels of land in the County of Maricopa, State of Arizona, described as follows:

Parcel 1: The Southeast $\frac{1}{4}$ of Section 3, Township 2 North, Range 1 West, Gila and Salt River Meridian.

Except the East 442.00 feet thereof.

Parcel 2: The North 100 feet of the East 442.00 feet of said Southeast $\frac{1}{4}$ of Section 3.

Containing 132.40 acres, more or less, including 1.72 acres, more or less, in roads.

[Endorsed]: Filed March 11, 1957.

[Title of District Court and Cause.]

DECLARATION OF TAKING

To the Honorable, The United States District Court:

I, the undersigned, James H. Douglas, Under Secretary of the Air Force of the United States of America, do hereby make the following declaration by direction of the Secretary of the Air Force:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257); Sections 2663 and 9773 of Title 10, United States Code, which authorize the acquisition of land for military purposes; Section 505 of

the Act of Congress approved September 28, 1951 (Public Law 155, 82nd Congress), which act authorizes acquisition of the land, and the Act of Congress approved July 27, 1956 (Public Law 814, 84th Congress), which act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for expanding needs and requirements of the Department of the Air Force and other military uses incident thereto. The said lands have been selected under the direction of the Secretary of the Air Force for acquisition by the United States for use in connection with Luke Air Force Base, Maricopa County, State of Arizona, and for such other uses as may be authorized by Congress or by Executive Order.

2. A general description of the lands being taken is set forth in Schedule "A," attached hereto and made a part hereof, and is a description of the same lands described in the petition in the above-entitled cause.

3. The estate hereby taken for said public uses is the fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

4. A plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by the undersigned as just compensation for the said lands, with all buildings

and improvements thereon and all appurtenances thereto and including any and all interests hereby taken in said lands, is set forth in Schedule "A" herein, which sum the undersigned causes to be deposited herewith in the registry of the court for the use and benefit of the persons entitled thereto. The undersigned is of the opinion that the ultimate award for said lands probably will be within any limits prescribed by law on the price to be paid therefor.

In Witness Whereof, the undersigned, the Under Secretary of the Air Force, hereunto subscribes his name by direction of the Secretary of the Air Force, this 26th day of February, A.D. 1957, in the City of Washington, District of Columbia.

/s/ JAMES H. DOUGLAS,
Under Secretary of the
Air Force.

Schedule "A"

The lands which are the subject matter of this Declaration of Taking aggregate 217.99 acres, more or less, situate and being in the County of Maricopa, State of Arizona. The description of the lands taken together with the names and addresses of the purported owners thereof and a statement of the sum estimated to be the just compensation therefore is as follows:

Tract No. H-800

The Southwest one-quarter of Section 3, Township 2 North, Range 1 West, Gila and Salt River Meridian, in the County of Maricopa, State of Arizona.

Except the West 1200.00 feet of said Southwest one-quarter.

Containing 85.59 acres, more or less, including 1.08 acres, more or less, in Glendale Avenue.

Name and Address of Purported Owner:

Tacy Clagett Moyer, formerly Tacy Clagett, wife of C. H. Moyer, 115 West Rose Lane, Phoenix, Arizona.

Estimated Compensation:

Fifty Four Thousand and No/100 Dollars (\$54,000.00).

Tract No. H-801

Two parcels of land in the County of Maricopa, State of Arizona, described as follows:

Parcel 1: The Southeast $\frac{1}{4}$ of Section 3, Township 2 North, Range 1 West, Gila and Salt River Meridian.

Except the East 442.00 feet thereof.

Parcel 2: The North 100 feet of the East 442.00 feet of said Southeast $\frac{1}{4}$ of Section 3.

Containing 132.40 acres, more or less, including 1.72 acres, more or less, in roads.

Names and Addresses of Purported Owners:

Arthur E. and Doris M. Baker, husband and wife,
Route 1, Box 735, Peoria, Arizona.

John L. and Bettie Jo Roach, husband and wife,
Route 1, Box 735, Peoria, Arizona.

Estimated Compensation:

Eighty-Seven Thousand and No/100 Dollars
(\$87,000.00).

The gross sum estimated by the acquiring agency
to be the just compensation for the lands hereby
taken is One Hundred Forty-One Thousand and
No/100 Dollars (\$141,000.00).

[Endorsed]: Filed March 11, 1957.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT IN
CONDEMNATION

Come Now the defendants, Arthur E. Baker,
Doris M. Baker, John L. Roach and Bettie Jo
Roach, through their attorneys undersigned, and
for their answer to the Government's Complaint
herein admit, deny and allege as follows:

I.

Admit that this is an action of a civil nature
brought at the request of the Secretary of the Air
Force for the taking of the defendants' property

under the power of eminent domain and for the ascertainment and award of just compensation to the defendants, pursuant to the Fifth Amendment to the United States Constitution.

II.

Admit that the Government relies upon those Acts of Congress set forth in Paragraph II of its Complaint as authority for this exercise of the power of eminent domain.*

III.*

IV.

Admit the allegations contained in Paragraphs IV, V, VI, VII and VIII of the Government's Complaint.

V.

In response to the action taken herein by United States Government, these answering defendants allege that the Government's appraisal of the said Tract No. H-801 including severance damages to the balance of the defendants' land in question and the Government's tender of said appraised sum to these defendants, as just compensation for the taking of the land herein, is and was a grossly inadequate sum.

These defendants are informed and believe and therefore allege that the highest, best, and most available use of the lands in question, within the

*[Note: Remainder of Paragraph II and entire Paragraph III stricken—order of 11/18/57.]

reasonably near future, is for the purpose and use of a subdivision for residential purposes, and that under these circumstances the lands in question presently have a fair market value of not less than \$1,200.00 per acre, which sum would total approximately \$158,400.00, and which said sum these defendants herewith allege to be equivalent to fair and just compensation for the land herein sought to be taken by the Government. Further, these defendants allege they will incur damages to the balance of their lands adjacent to the said Tract No. H-801, in the total sum of \$40,000.00.

Wherefore, these answering defendants pray judgment against the United States Government as follows:

1. That they receive a trial by jury on the issue of just compensation;

2. That they be awarded the sum of \$158,400.00 as and for the fair market value of the lands herein, and as and for severance damages to the balance of the lands owned by these defendants and which are adjacent to Tract No. H-801, they be awarded the sum of \$40,000.00.

WHITNEY & LaPRADE,

By /s/ PAUL W. LaPRADE,
Attorneys for Defendants Arthur E. Baker, Doris
M. Baker, John L. Roach and Bettie Jo Roach.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 30, 1957.

REQUESTED INSTRUCTIONS*

Plaintiff's Requested Instruction No. 1

You are instructed that this case involves the taking by the United States of America for a public purpose of the fee simple estate, or entire title, to Tract No. H-801 consisting of 132.40 acres described as follows:

Tract No. H-801

Two parcels of land in County of Maricopa, State of Arizona, described as follows:

Parcel 1: The SW $\frac{1}{2}$, Section 3, Township 2 North, Range 1 West, Gila and Salt River Base & Meridian; except the East 442.00 feet thereof.

Parcel 2: The North 100 feet of the East 442.00 feet of the SE $\frac{1}{4}$ of Section 3.

This tract, consisting of 132.40 acres, is a part of a farm unit owned by the Defendants consisting of 510.00 acres, more or less. After the Government's taking there remains 388.00 acres, more or less, in the Defendants' farm.

Given: ✓

Refused:

Given as Modified:

*[Note: These instructions are printed as corrected on the originals. No indication of the location of said corrections appears here.]

Plaintiff's Requested Instruction No. 2

The taking of property by the United States Government in the exercise of its power of eminent domain under the United States Constitution implies a promise to pay just compensation therefor. Just Compensation, often referred to as market value, means compensation which is just, not only to the Defendants, but to the Government. In arriving at just compensation, or market value, you are to determine the market value of Tract No. H-801 on March 11, 1957. This date, March 11, 1957, is the date of taking, or the date on which the Government took the Defendants' tract of land. Consequently, the market value of Tract No. H-801 on March 11, 1957, is the only issue upon which you are asked to decide in this case.

Given: ✓

Refused:

Given as Modified:

Defendants' Instruction No. 2

I instruct you that by market value is meant the amount of money that the property in question will bring if sold in the open market, under normal conditions, with a reasonable time within which to find a purchaser, the seller being willing but not obliged or forced to sell to a buyer ready, willing and able, but not obliged to buy, and being allowed a reasonable time to investigate the property and all the uses for which it is adapted.

Given: ✓

Refused:

Given as Modified:

Plaintiff's Requested Instruction No. 3

In your deliberations on market value, or just compensation, you are not to consider the price that the tract of land would sell for under special or extraordinary circumstances. You will consider only the market value of the land and as if it were sold on the open market between a willing buyer and seller under ordinary circumstances on March 11, 1957. It is not, therefore, a question of the value of the property to the Defendants, or a question of the value of the property to the Government, it is a question of market value on March 11, 1957.

Given: ✓

Refused:

Given as Modified:

Defendants' Instruction No. 3

Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid to Messrs. Roach and Baker does not depend solely upon the uses to which they have devoted their land, but is to be arrived at upon just consideration of all the uses for which it is suitable, and the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably foreseeable

future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property was privately held.

Mississippi Boom Co. vs. Patterson,
98 U. S. 403.

Olson vs. U. S.,
54 S. Ct. 708.

U. S. vs. Powelson,
63 S. Ct. 1047.

Given: ✓

Refused:

Given as Modified:

Plaintiff's Requested Instruction No. 3B

Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from your consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value.

Olson vs. United States,
292 U. S. 246, 257.

Given: ✓

Refused:

Given as Modified:

Defendants' Instruction No. 4

It is first claimed by Messrs. Roach and Baker that the highest and most profitable use for which their property, to wit, 132.4 acres, was adaptable and needed on March 11, 1957, was for the use of a residential subdivision on the rear acreage and for commercial purposes on the Glendale Avenue frontage. On the other hand, the Government claims that the highest and most profitable use to which this land could have been put on March 11, 1957, was for farming purposes and uses.

The defendants, Roach and Baker, have countered with the argument that if the Government's farm usage theory is the correct one on that issue, the taking of their 132.4 acres not only deprives them of that portion of their farm, but also damages the remainder of their farm. In other words, under the Government's farm usage theory, the defendants are claiming what is called severance damages.

Given:

Refused: ✓

Given as Modified:

Defendants' Instruction No. 6

You must first find the fair and reasonable market value of their entire holdings. You then must find the fair and reasonable market value of the remainder of the land that was left to the defendants immediately after the taking. The difference between the two figures will be the amount that they should recover.

Given:

Refused: ✓

Given as Modified:

Plaintiff's Requested Instruction No. 4

In this case, where an entire tract has been used and treated as an entity, it should be so treated in determining market value.

United States vs. Miller, *supra*

As I stated before, Tract H-801 is a part of the farm unit owned by the defendants. It is a rule of law that, in the condemnation of a part of a tract owned by the defendants, just compensation is the market value of the entire tract before the taking, minus the market value of the remaining tract after the taking of Tract H-801 on March 11, 1957. The answer will be just compensation, or market value of the tract taken by the government, plus severance damage to the remaining tract, if any. This is commonly referred to as the "Before and After Rule."

United States vs. Honolulu Plantation Co.,
182 F. 2, 172, 175 (C.A. 9th, 1950).

Severance damage is more easily described than defined. For example, as in the case where only a part of a tract is taken from the owners, the owners' just compensation includes any element of market value arising out of the relationship of the part of the tract taken to the entire tract. The injury to this

relationship and element of market value is often spoken of as severance damage.

United States vs. Miller.

Given: ✓

Refused:

Given as Modified:

Plaintiff's Requested Instruction No. 5

The test of whether or not severance damage exists in the taking is the existence of loss or impairment in the market value of the remaining land after the taking which can be directly attributed to the taking.

United States vs. 11 Acres,
54 F. Supp. 89, (E.D. N.Y., 1944).

Given: ✓

Refused:

Given as Modified:

Plaintiff's Requested Instruction No. 6B

In applying the "market value" standard no account is to be given to values or necessities peculiar to the Defendant or the Government, but consideration should be given only to such matters as would affect the ordinary willing buyer and seller in negotiating a fair price. To reach this result, the jury may consider all matters which would naturally influence agreement upon a price by sellers and buyers willing but not compelled to bargain. Obviously, the uses to which the property may be put

vitally affect its value. But “use” in this sense does not mean mere physical adaptability. It is use adaptability which concerns us. Since value is to be determined as of the time of taking, it is use adaptability apparent at that time. Since market value is the standard sought, it is use adaptability which would affect market value at the time of taking—that is, which would influence a seller and a buyer in arriving at a fair price then. The above considerations limit the uses which may be shown.

Olson vs. United States,

67 F. 2d 24 (affirmed U. S. S. Ct. 292
U. S. 246).

Given: ✓

Refused:

Given as Modified:

Plaintiff's Requested Instruction No. 7

Comparable sales, at arms length, in the open market of real property, often referred to as similar sales, that occurred before the date of taking, are the best evidence of market value.

Welch vs. Tennessee Valley Authority,

108 F. 2, 95, 101 (C.A. 6, 1939), Cert. Den.
309 U. S. 688.

United States vs. Honolulu Plantation Co.,

182 F. 2, 172, 176 (C.A. 9, 1950).

Kinter vs. United States,

156 F. 2, 5, 7 (C.A. 3, 1946).

Given:

Refused: ✓

Given as Modified:

Plaintiff's Requested Instruction No. 8

The Defendants and not the Government have the burden of establishing upon fair preponderance of all the evidence in the case the market value of the lands taken. By a fair preponderance of the evidence is not necessarily meant the greater in number of witnesses, but the greater evidence in weight and credibility, and considering all the evidence in the case, the evidence that tends to establish a given fact outweighs the evidence to the contrary. If, after considering all the evidence in the case, you find that the evidence upon any question is evenly balanced, you shall answer such question against the Defendants who have the burden of that issue, for in such a case there would be no preponderance in favor of such proposition.

United States ex rel. T.V.A. vs. Powelson,
319 U. S. 266 at 273, 274.

Ralph vs. Hazen,
93 F. 2d, 68 at 70.

State vs. Sawyer,
Cir. Ct. Marion Co., Indiana, No. 40958.

Given: ✓

Refused:

Given as Modified:

Plaintiff's Requested Instruction No. 9

You are instructed that the burden of proving the highest and best use of the property contended by the defendant landowners, as well as the burden of proving the fair market value of Tract No. H-801, rests with the defendant land owners whose property is taken and not upon the Government. Severance damage defined earlier in these instructions must also be proven by a preponderance of the evidence by the defendant landowners.

United States vs. 70.39 Acres of Land,
164 F. Supp. 451 at 476 (U.S.D.C. S.D.
Cal., 1958).

Given: ✓

Refused:

Given as Modified:

Plaintiff's Requested Instruction No. 10

A number of witnesses have testified as to their opinions of the value of the properties under consideration. In connection with the opinion evidence in general that has been produced in this case, the Court instructs you that opinion evidence is not a statement of fact, but is a mere statement of the witness' opinion. It is your duty to determine whether such opinions are correct or erroneous, and in arriving at your conclusion you should consider the grounds upon which the witnesses based their opinions, their experience and knowledge of the matters about which they testified, the evidence in the case, and reasonableness or unreasonableness of

their opinions as viewed in the light of their knowledge and experience, using in this connection your own common sense, knowledge, and experience.

You are the sole judges of the credibility of the witness and of the weight that should be given to their testimony, including the testimony of the opinion witnesses. With that the Court has nothing to do. It is the province of the Court to declare to you the law applicable to any phase of the testimony, and it is your duty to apply that law to the testimony and to return a verdict, in connection with the tract of land, in accordance with both the law and the evidence.

You are to judge the evidence of each witness by the reasonableness or unreasonableness of his testimony; the means of knowing that about which he testifies; the manner and deportment of the witness while testifying; his interest, if any he has; his bias or prejudice, if any he manifests; and give all the testimony the weight it should have in reaching a conclusion as to what is the truth of the case.

In passing upon the testimony in the case you are to exercise your common sense, your reason and your judgment in the light of your experience in life, and your observation of the conduct of people, and ascertain from the whole testimony what the truth is, and base your verdict upon that.

10 F.R.D. 293, 319.

Given: ✓

Refused:

Given as Modified:

Plaintiff's Requested Instruction No. 11

With regard to the view that you took of Tract H-801, Friday afternoon, you are directed to remove from your consideration of Market Value the fact that the Government is presently making use of the condemned tract of land. You are to value the farm in the condition that it was in on March 11, 1957. The testimony of the Government's and Defendants' witnesses will be helpful to you in recreating the condition of said tract at that time.

You are further instructed that the Defendants are not entitled to compensation for loss of any future gain they might have hoped to realize from the tract over and above its fair market value. This is true also with respect to the Government. You are not to consider any personal loss or gain to either party. Market value of the property on the date of taking is the only problem under consideration.

Seaboard Air Line Co. vs. United States,
275 F. 77 (E.D. S.C., 1921) affirmed 261
U. S. 299 (1923).

Given:

Refused:

Given as Modified: ✓

[Endorsed]: Filed November 25, 1958.

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find that the fair market value of the Baker and Roach land, Tract No. H-801, as of March 11, 1957, is \$165,500.00.

/s/ CHARLES A. BECKER,
Foreman.

[Endorsed]: Filed November 25, 1958.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

(Rule 59, Federal Rules of Civil Procedure, 28 U.S.C.)

Plaintiff in the above-entitled action moves the Court for an order setting aside the verdict entered in this action on November 25, 1958, as just compensation for the taking by the Plaintiff of Tract No. H-801, and granting a new trial upon the following grounds:

1. The Court erred in refusing to grant Plaintiff's requested instruction 7 and the first paragraph of Plaintiff's requested instruction 11.
2. The verdict of the jury was contrary to law.

3. The verdict of the jury on the issue of just compensation is excessive and directly results from the testimony by Defendants' expert witnesses whose methods and procedures are contrary to federal condemnation law.

4. The verdict of the jury was excessive for the reason that the instructions given the jury failed completely to advise them of the nature, weight and character of comparable sales.

5. The verdict of the jury was excessive for the reason that the Court failed to instruct the jury in other legally acceptable methods of appraisal if they found as a fact that there were no comparable sales.

6. The verdict is contrary to the evidence.

7. The Court erred in denying Plaintiff's Motion to direct a verdict in its favor at the close of all evidence.

This Motion is based upon the Memorandum attached hereto.

JACK D. H. HAYS,
United States Attorney;

/s/ WILLIAM E. EUBANK,
Assistant U. S. Attorney.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 5, 1958.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY,
DECEMBER 15, 1958

Honorable Dave W. Ling, United States District
Judge, Presiding.

Plaintiff's Motion for New Trial is called for
hearing this day. Wm. Eubank, Esq., Assistant
United States Attorney, appears for the Government.
Paul La Prade, Esq., appears for the defendants
Arthur E. and Doris M. Baker and John L. and
Bettie Jo Roach. Said Motion is argued by respec-
tive counsel.

It Is Ordered that said Motion for New Trial is
denied.

In the United States District Court
for the District of Arizona
No. Civ. 2597—Phx.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

217.99 ACRES OF LAND, More or Less, Situate in
the County of Maricopa, State of Arizona;
ARTHUR E. BAKER, et al., and UNKNOWN
OWNERS,
Defendants.

FINAL JUDGMENT
(Tract No. H-801)

This matter coming on regularly for trial before
this Court sitting with a jury on November 19,

1958, to determine the just compensation due the former owners of Tract No. H-801, for the taking of the fee simple estate in said tract of land, described hereinafter, and the United States of America appearing by William E. Eubank, Assistant United States Attorney, District of Arizona, and the Defendants Arthur E. Baker, Doris M. Baker, husband and wife, and John L. Roach and Bettie Jo Roach, husband and wife, appearing personally and by Louis B. Whitney and Paul W. La Prade, and no other persons appearing; and at the trial evidence, both oral and written, having been introduced on behalf of both parties for consideration by the Court and jury; and the jury after having been instructed in the applicable law by the Court; and after having given due consideration to the evidence returned a written verdict into open Court setting the just compensation due Defendants for all interests taken and destroyed by this condemnation action; and the Court having been fully advised in the premises,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed as follows:

1. The Plaintiff has the right to condemn the real property described in paragraph 2, herein, for the public use stated in the Declaration of Taking filed herein on March 11, 1957.

2. The fee simple absolute estate in Tract No. H-801, hereafter described, subject, however, to existing easements for public roads and highways,

public utilities, railroads and pipelines, is vested in the United States of America as of March 11, 1957, to wit:

Two parcels of land in the County of Maricopa, State of Arizona, described as follows:

Parcel 1: The Southeast $\frac{1}{4}$ of Section 3, Township 2 North, Range 1 West, Gila and Salt River Meridian, Except the East 442.00 feet thereof.

Parcel 2: The North 100 feet of the East 442.00 feet of said Southeast $\frac{1}{4}$ of Section 3.

Containing 132.40 acres, more or less, including 1.72 acres, more or less, in roads.

3. Arthur E. and Doris M. Baker, husband and wife, and John L. and Bettie Jo Roach, husband and wife, are the former owners of Tract No. H-801, taken by this condemnation, and as such are entitled to the just compensation awarded for the taking of the land by the Plaintiff in the sum hereafter set out.

4. The just compensation due the former owners, set out in paragraph 3, heretofore, from the Plaintiff for the taking of the land, described in paragraph 2, heretofore, is One Hundred Sixty-five Thousand Five Hundred and no/100 (\$165,500.00) Dollars; toward payment of this compensation the Plaintiff has heretofore deposited Eighty-seven Thousand and no/100 (\$87,000.00) Dollars in the Registry of this Court as estimated just compensa-

tion for the taking of Tract No. H-801 with the filing of the Declaration of Taking, of which sum Defendants have withdrawn Seventy-eight Thousand Three Hundred and no/100 (\$78,300.00) Dollars from the Registry of the Court on April 30, 1957; consequently, Plaintiff must deposit in the Registry a deficiency sum in the amount of Seventy-eight Thousand Five Hundred and no/100 (\$78,500.00) Dollars for the Defendants.

5. In addition to the just compensation awarded Defendants in paragraph numbered 4, heretofore, the Plaintiff shall pay the Defendants interest at the rate of six (6) per cent per annum on the principal deficiency sum of Seventy-eight Thousand Five Hundred and no/100 (\$78,500.00) from March 11, 1957, until the date that such deficiency sum is deposited into the Registry of this Court, at which time interests shall cease entirely.

6. The Clerk of Court is directed to pay out of the Registry of this Court the amounts adjudged herein as just compensation and interest as specifically set forth in paragraphs numbered 4 and 5, heretofore, when such sums have been deposited therein to the account of Tract No. H-801, by making his Registry check payable to Arthur E. and Doris M. Baker, and John L. and Bettie Jo Roach, and delivering said check by placing it in the United States Mails addressed to Messrs, Whitney & LaPrade, Attention: Paul W. LaPrade, Attorneys at Law, 810 Luhrs Tower, Phoenix, Arizona.

7. No other person, real or artificial, is entitled to just compensation for the taking, by the Plaintiff, of the real property described hertofore as Tract No. H-801.

8. There are no legal interests in land, other than those heretofore enumerated, requiring payment by the Plaintiff of just compensation for the taking of the fee simple absolute estate in the land condemned, and the just compensation awarded in paragraph numbered 4, heretofore, is the just compensation for all property rights taken or destroyed by this taking.

Dated this 2nd day of January, 1959.

/s/ DAVID W. LING,

Judge, United States District Court for the District
of Arizona.

Prepared by: William E. Eubank, Assistant
United States Attorney. Reserving, however, all
questions of law and fact in the event of an appeal.

Approved as to Form:

WHITNEY & LaPRADE,

By /s/ PAUL W. LaPRADE,

Attorneys for the Defendants,
Baker and Roach.

[Endorsed]: Filed and entered January 2, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, Plaintiff in the above-entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that part of the Judgment entered by this Court on January 2, 1959, relating to the determination of just compensation for Tract No. H-801.

Dated this 6th day of February, 1959.

JACK D. H. HAYS,
United States Attorney;

/s/ WILLIAM E. EUBANK,
Assistant U. S. Attorney.

Affidavit of Mail attached.

[Endorsed]: Filed February 10, 1959.

In the United States District Court
for the District of Arizona

No. Civ-2597—Phx.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

217.99 ACRES OF LAND, et al.,

Defendants.

Before: Honorable Dave W. Ling, Judge, and a
Jury.

TRANSCRIPT OF PROCEEDINGS

November 19, 1958—11:00 o'Clock A.M.

Appearances:

MR. JACK D. H. HAYS,

U. S. District Attorney, by

MR. WILLIAM E. EUBANK,

Asst. United States Attorney,

Appeared for the Government.

WHITNEY & LaPRADE, by

MR. LOUIS B. WHITNEY, and

MR. PAUL W. LaPRADE,

Appeared for Defendants Arthur E. Baker
and Doris M. Baker; and John L. Roach
and Bettie Jo Roach.

R. R. McGREW

called as a witness in behalf of the Defendants,
having been first duly sworn, testified as follows:

Direct Examination

By Mr. LaPrade:

* * *

Q. What is your occupation?

A. I am a Land Planning and Zoning [7*] Consultant.

* * *

A. I was with the City of Phoenix Planning Department from 1945 until 1953, as a planning technician.

And I was with the Maricopa County Planning and Zoning Commission from 1953 until September, 1958, as Planning Director.

Prior to that, I was with the Allegheny County Planning Department for five years, at Pittsburgh, Pennsylvania.

Q. In your experience in the field of land planning, have you in all and each of the occupations to which you have testified, have you had occasion to be called upon to make studies or determinations as to the highest and best use to which any given tracts of land may be devoted?

A. Yes, sir.

Q. Generally speaking, what are the principal factors which you must consider in arriving at the

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of R. R. McGrew.)

valuation and determination of the highest and best use for land in general?

A. First off, you have to consider the conditions in the immediate vicinity or neighborhood of the land; and, secondly, the trends of growth that are taking place, or appear to be taking place for the future development of the whole area.

Then you have to consider how your parcel of land fits into that future development, and the existing conditions in the area. [8]

Q. Does the physical characteristic of the land itself play any part at all? That is, the topography, I am speaking of.

A. It does in determining how the future use of that land should be developed, yes. I would say yes to your question.

Q. In your present occupation as a land planner, do you have in Phoenix, Arizona, occasion to be called upon to make determinations as to the best and most expedient method of devoting given lands?

A. Yes, sir.

Q. For how long have you been engaged in that particular line of work?

A. Since September of 1957.

Q. That is while you are self-employed, you mean?

A. Yes.

Q. When you were serving as Director of the Planning Department of the Maricopa County Zoning Commission, did you have occasion to acquaint yourself with the general residential development in this valley?

A. Yes, sir.

(Testimony of R. R. McGrew.)

Q. Do you know in which direction the general population movement is going?

A. I believe so.

Q. And what direction is that, sir? [9]

A. Actually, it is going in all directions. It also is tending to follow your major highways and arterials, but, generally speaking, the population in this valley is going principally north, east, and west. But it is also going south to a fairly good extent.

Q. In this action, Mr. McGrew, we are concerned with what I will refer to as the Roach-Baker property, or otherwise known in the case as Tract H-801.

Are you familiar with that land owned by the defendants? A. Yes.

Q. Have you been on that land?

A. I have.

Q. Have you been in the general vicinity?

A. I have.

Q. Have you familiarized yourself with the surrounding circumstances, and which may be a factor in determining the highest and best use of that land now, or in March of 1957? A. Yes, sir.

Q. Were you acquainted with the general conditions in that particular area at or about March 11, 1957? A. Yes, sir.

Q. Was that by virtue of your experience as Planning Director for Maricopa County?

A. Principally, yes. [10]

* * *

Q. (By Mr. LaPrade): Mr. McGrew, I refer you to Defendants' Exhibit A for identification, and

(Testimony of R. R. McGrew.)

ask you to examine the document, and without reference to any particular item on it, generally speaking, explain to the jury what this document represents.

A. This document is in two parts. No. 1 in the upper right-hand corner is a vicinity map showing the property, with respect to the area, and the general portion of the rest of the map is showing the Baker-Roach property, and the road system in the general area, and property system.

Q. I notice you have filled in certain portions in green pencil.

Can you tell the jury what that represents, in principle?

A. That represents the Baker-Roach properties at approximately March 11, 1953.

Q. That would be the land which the Government has condemned, and in addition thereto, the balance of the land? [11]

* * *

Q. I notice that you have embossed over a portion of the green with, on an angle, brown marks. Can you explain generally what that represents?

A. That generally represents the portion of the Baker-Roach property under condemnation, and an additional housing project to the west of it, all part of the same project.

Q. I note in the lower left-hand corner on what you have designated as Litchfield Road, which also refers, by way of reference, would be the——

Mr. Eubank: I object to this, your Honor, I

(Testimony of R. R. McGrew.)

know what counsel is going to say, and it is definitely inadmissible. And if he will offer the thing, I will make my objection to the map.

The Court: I don't know what he is going to say. [12]

* * *

Q. (By Mr. LaPrade): Mr. McGrew, have you made an appraisal of Tract H-801, as of March 11, 1957, with respect to the factors and influences in that immediate vicinity which may or may not affect the use to which the land could have been devoted, or the market demand for any given use which existed?

A. Could I have that question repeated, [13] please?

* * *

A. (By the witness): Yes.

Q. (By Mr. LaPrade): What were the factors which you have considered in arriving at your opinion?

A. Well, the factor in the immediate vicinity that had the greatest influence on my conclusion is the Luke Air Force Base itself, with the large number of personnel who are employed there, live there, or, rather, are employed there and commute back and forth to the base.

Of course, other factors are the uses that have already moved into the area, or are in the process of developing into the area, such as a trailer court

(Testimony of R. R. McGrew.)

on Glendale Avenue, a subdivision to the south that has been started and partially developed.

Q. Where is that, sir?

A. That is immediately adjacent to the southeast corner of the airport.

Q. With reference to Defendants' Exhibit A for identification, can you orally designate where in this instrument that subdivision appears?

A. Yes. It is on the east side of Litchfield Road at the immediate south end, bottom of the map.

Q. It would be here?

A. South end of Glendale. [14]

* * *

Q. There have been a lot of statements about future development.

Isn't it the function of the land planner to take the over-all look of developments over the years?

A. That should be one of the big factors, yes, sir.

Q. In other words, you are mainly, your main function is to determine trends that are going to raise problems in the years to come in the area, isn't that true?

A. That should have quite an influence on a determination.

Q. And then on that basis you are able to recommend to the Zoning Commission that they must take certain steps in zoning certain areas of the county, isn't that correct?

A. Well, you take other factors into account on your determinations, too.

Q. In this particular plat that you drew, does

(Testimony of R. R. McGrew.)

this item here entitled "Noise Clearance Zone" have anything to do with the land use study that you made of this area?

A. This map is not a land use map.

Q. This is the one you identified as one that you drew, is that correct? A. Yes, sir.

Q. All right. Does this Noise Clearance Zone have anything to do with your opinion on the use of this land as of March 11, 1957? [17]

* * *

Q. This Noise Clearance Zone, if you notice, you have that outside of the Baker-Roach property, is that correct? A. Yes, sir.

Q. What is its relationship to this taking here, Tract H-801?

A. I assume—do you mean what was the Air Force thinking when they condemned—

Q. No, all we worry about here today is Tract H-801, this property here. What do we care about this stuff over here?

A. In my opinion, the fact that the Noise Clearance Zone is west of the Baker-Roach property would indicate it makes it that much more desirable for subdivision, because it is outside of the noise area, where the army determined [19] the noise factor would end with their take-offs and landings, and circling.

Q. So by the fact that it is outside of the noise clearance area, that helps you in deciding the use of the land?

A. That would make it more desirable for resi-

(Testimony of R. R. McGrew.)

dential, more so than if it were west of the line on that map. [20]

* * *

Q. Mr. McGrew, do you know whether, from your studies of the situation, there is any available water supply on the Roach-Baker land?

A. I understand there are wells to the north, and an [21] irrigation system that they serve.

Q. That they serve for agricultural purposes. Would that have an effect on whether this, or any given land, the availability of water, that is, would that be a factor as to whether this land, or any land was suitable for residential purposes?

A. It certainly would.

Q. Did you consider that in examining this property?

A. I did to this extent, that you simply can't develop property for residential without water, and it makes it a lot cheaper for a subdivider to develop his property if he already has the water there.

However, if the water were not there, it would be possible to bring it in from elsewhere, and still develop the property for residential.

Q. Does this property on the southern line of it, as indicated on the map, front on Glendale Avenue? A. Yes.

Q. Point out to the jury the Roach-Baker property as it was March 11, 1957, their holdings.

A. The Roach-Baker property is shown in the yellowish color on this map, and it goes south on Glendale Avenue, and goes north of North Avenue,

(Testimony of R. R. McGrew.)

and is on both sides of Dysart Road, and is outlined by the heavy black border. [22]

* * *

Q. What is this white triangular place?

A. That is a parcel of land sold from the Baker-Roach property, and is being developed for school purposes.

Q. Dysart School? A. Yes.

Q. What function does Glendale Avenue serve in this vicinity?

A. Glendale Avenue feeds the bulk of the traffic from Phoenix and Glendale area to Luke Field.

Q. Is Dysart Road on the section line? [23]

A. Yes.

* * *

Q. As of March 11, 1957, do you know whether there was any contemplated action in connection with any widening of Glendale Avenue in that area?

A. There was.

Q. By whom? A. By Maricopa County.

Q. What was that contemplated action?

A. They were proposing Glendale Avenue with a 130-foot right-of-way.

Q. As of March 11, 1957, were there any commercial activities in that general area?

A. Yes, there was a commercial activity at Glendale Avenue and Litchfield Road.

Q. What was that?

A. A tavern and bar.

(Testimony of R. R. McGrew.)

Q. On which corner? A. The gas station.

Q. How far is that? [24]

A. It is within half a mile of it.

Q. Do you know whether as of March 11, 1957, there had been any specific action taken with respect to zoning of any of the Roach-Baker land by the Maricopa County Board of Supervisors?

A. Yes, sir.

Q. What was that, sir?

A. There was commercial zoning established on both the southwest and the northwest corners of the intersection of Dysart Road and Glendale Avenue.

Q. On this exhibit, point out for the jury's benefit precisely where that was.

A. That is two corners right here.

Q. The northwest corner of Northern and Dysart, and the southwest corner of Glendale and Dysart? A. Yes.

Q. Had in fact that been resold?

A. Yes.

Q. For what purpose?

A. For commercial uses.

Q. Was there any zoning with respect to the balance of the lands? A. I believe not.

Q. If not, what would be its general classifications?

A. What would be termed unclassified, which permits [25] residential uses.

Q. With reference to your general knowledge and your experience in all of the matters you have

(Testimony of R. R. McGrew.)

testified to here today, have you formed an opinion as to the highest and most profitable use to which Tract H-801 owned by the defendants Roach and Baker could have been devoted or used for as of the date March 11, 1957? A. Yes, sir.

Q. And what is that opinion?

Mr. Eubank: I object to that, your Honor. The objection is on the basis of relevancy, that the testimony of this witness has not determined a market as understood in Federal Condemnation Law, and the market value is certainly not determined by zoning practices of the Maricopa County Zoning Board.

I think it is highly prejudicial, and will definitely confuse the jury if this man is allowed to testify on the basis of the so-called study, or the background material that is set out here as the basis for his decision.

The Court: I will let him testify. I can take care of that by an instruction very easily.

Q. (By Mr. LaPrade): What is your opinion, Mr. McGrew?

A. My opinion is that the best use for that property would be a combination of residential and commercial uses.

Q. Where would the commercial be? [26]

A. The commercial would be at least at the corner of Dysart Road, both corners, or all three corners of the Baker-Roach property, and possibly extending toward the Luke Field Base, over part of the property.

(Testimony of R. R. McGrew.)

Q. And the residential would be the remaining land on Tract H-801? A. That is correct.

Q. Which would be on the north side of Glendale Avenue? A. Yes, sir. [27]

* * *

LOUIS J. COMBS

called as a witness in behalf of the Defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. LaPrade:

Q. State your name, sir.

A. Captain Louis J. Combs.

Q. You are a captain in the United States Air Force? A. That is right.

Q. Where are you stationed?

A. At Luke Air Force Base.

Q. What capacity are you serving in the Air Force at the present time?

A. I am the Information Services Officer.

Q. How long have you been stationed at Luke Air Force Base? A. Since February, 1957.

Q. Are you acquainted, Captain, with the general location of the land involved in this lawsuit?

A. I am. [29]

* * *

Q. Have you made it your business to investigate and inquire into the total personnel stationed

(Testimony of Louis J. Combs.)

at Luke Air Force Base approximately as of the month of March of 1957? A. I have.

Q. What is that total population?

* * *

A. (By the Witness): As of the 31st of March, 1957, [30] the total strength of the Base, officer, airmen, and civilian was 4,574 people.

Q. (By Mr. LaPrade): Do you have the figures as to how many of those 4,574 persons were not living on the air base?

A. Yes, I have. They were not living on the air base, there were 276 officers, 494 airmen living off base, and the total civilian figure, 1,369.

Q. Those would be civilian personnel employed by the Air Force and working on the Base?

A. That is correct.

Q. Do you know of the off-base personnel, by that I mean those not living on the base, how many of those were married, either in numbers or percentages, sir?

A. Would you repeat your question? The number that were not married, or were married, off-base?

Q. Were married, sir.

A. In the case of the airmen, the total number that were off-base, 494 would be married, living off-base; in the case of the officers would be approximately 250 who are married living off-base.

Q. I missed one point, Captain. On the airmen you said 494 living off-base? A. Right.

(Testimony of Louis J. Combs.)

Q. Were those all married?

A. Right. They would all be married. The unmarried [31] airmen would stay on the base.

* * *

Q. To sum it up, then, I assume it is your testimony that approximately 2,000 persons were either stationed or working at the Base, but living off the base?

A. That is correct. It would be 2,139 people, according to my figures.

Q. Of your definite knowledge, approximately 700 were married? A. Yes, sir.

Q. Do you know whether Luke Air Force Base, what its status is with respect to the Air Force Program in general?

A. Luke Air Force Base became a permanent Air Force Installation on the 7th day of April, 1956. [32]

* * *

Q. On March 11, 1957, were there any facilities available, to your knowledge, on or about Luke Air Force Base, which could have been or were devoted for the purpose of housing military or civilian personnel? [33]

A. As of that date on the base we had space for 52 officers and their families, and 65 airmen and their families.

So far as other facilities, they would be private rentals in Litchfield and Goodyear, and in Glendale.

(Testimony of Louis J. Combs.)

Q. Do you know that the married personnel living off of the base in fact were living as far away as Glendale? A. Yes, sir, they were.

Q. Do you know whether any of them were living as far away as in Phoenix?

A. I can't say definitely. I can presume so, because we still have people living as far away as Phoenix.

Q. And they must commute every day to the Base? A. That is correct.

Q. Would that be true with respect to civilian personnel? A. Correct.

Q. Captain, do you know whether on March 11, 1957, there was a need or a demand for housing of base personnel at Luke Air Force Base?

A. There was. [34]

* * *

Redirect Examination

By Mr. LaPrade:

* * *

Q. Do you know how many units are being constructed on this land?

A. I understand that there are going to be a total of some 700 when they are completed.

Q. And when they are completed and occupied by base personnel, do you know whether that will accommodate the immediate demand for housing?

A. I am not in a position to answer that question. I presume it will to some extent. Whether it will resolve the problem finally, I don't know.

(Testimony of Louis J. Combs.)

Q. That will certainly alleviate the problem, will it not? A. It will. [37]

* * *

J. LESLIE HANSEN,
called as a witness in behalf of the Government,
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Eubank:

* * *

Q. And you are a realtor-appraiser, and you reside here in Phoenix, Arizona?

A. Yes. [39]

* * *

I then took into consideration the sales of the other property that occurred; one here at the corner of Glendale Avenue and Litchfield Road——

* * *

The Witness: This sale occurred in 1953, [55] sir.

* * *

Mr. LaPrade: In particular, I might add to my objection not only that it is prejudicial, it is remote in point of time, and that from the prior evidence in this case, it was long before Luke Air Force Base became a permanent facility.

The Court: That may be a little remote. I will sustain the objection.

(Testimony of J. Leslie Hansen.)

A. (By the Witness): I took into consideration all the sales that occurred in the area anywhere around in that part of the country that I could find, in the area that I considered to be associated with the date, limited by the fact that some did not occur, therefore I had to take this one that we are discussing now.

But I found sales in here west of Luke Field in the Adaman Irrigation District, oh, some 15 sales or more, I guess.

I found some sales in the area east of the subject property, and I took and looked at them all, and took into consideration what they were, the types of farm, [56] and the type of operation, the water conditions so far as the subject sales of the comparable sales is concerned, and the subject property, and considered the highest and best use of the subject property, as to whether or not it was straight farm, whether there was speculative value, whether there was demand for this, or for that, and as a result of that study formed my opinion of the value of the farm before the taking.

Q. Now, as to the highest and best use as you just defined, what is the highest and best use?

A. In my opinion, the highest and best use of the Baker farm is as a farm with a speculative value increase, because of the speculative activity along Glendale Avenue.

Q. (By Mr. Eubank): There has been testimony this morning relating to the residential possibility, or that the Baker-Roach farm has right on

(Testimony of J. Leslie Hansen.)

—well, at March 11, 1957, the date of taking, that it has residential possibilities. Do you concur with that?

A. No, I do not, and I have a reason for it.

Q. Why do you not?

A. I have a reason for it.

Q. All right.

A. May I state it on this map?

Q. Yes.

A. A subdivision is located not quite, or about [57] a quarter of a mile south of Glendale Avenue on the east side of Litchfield Road.

It is a 244 lot subdivision that extends in area up to this line, and down to this line and here, and as of March 11, 1957, there had been less than 26 lots sold, and only five houses built.

Q. When was that subdivision opened?

A. That subdivision was filed in 1953.

Q. Does that aerial photograph there show the extent of that subdivision?

A. It shows an outline of the lot, and there is no development east of the wash in this subdivision. Thus far, all activities have been here.

Mr. LaPrade: Pardon me. Could we have him pencil it in some way?

Q. (By Mr. Eubank): Yes, would you take that red pencil and just circle that?

A. Circle the whole subdivision?

Q. Yes, the houses right there, just put a circle around it so they can find it.

(Testimony of J. Leslie Hansen.)

A. You want to show the outline of the whole subdivision, the land involved in the subdivision?

Q. Yes.

A. (Indicating): This part is the only part that is developed. And I took that into [58] consideration.

Q. Did you actually see that subdivision?

A. Yes.

Q. Were there any improvements on it whatsoever?

A. Yes, there are five, or I don't remember whether it is five or six houses that have been built.

Q. What type of houses are they?

A. Rather modest type single-family residences.

Q. Are there any roads?

A. Yes, there are roads in this part of the subdivision.

Q. Are there any improved roads?

A. No, just surfaced, gravel surfaced roads.

Q. Now, in your quest of this highest and best use, did you talk to the developer of that subdivision?

A. Yes, I did.

Q. What did he tell you about it?

Mr. LaPrade: I object to anything the developer told him.

Mr. Eubank: This is an expert witness, your Honor, on appraisal. The hearsay is a necessary part of their determining the value, the market value.

The Court: I think so. No question about it.

The Witness: The subdivider told me about the

(Testimony of J. Leslie Hansen.)

history of the subject land before he bought it, how long it had been offered, and how much money he paid down, and the price he paid for it. [59]

Q. (By Mr. Eubank): What did he pay for the land itself?

Mr. LaPrade: I object to it, your Honor, unless we know when it was.

The Court: Do you know when it was?

The Witness: I did, yes, sir.

He bought it in August of 1953. I have the docket in two deeds.

Mr. LaPrade: I object to that on any basis for admission in this case. Too remote in point of time.

The Court: Objection overruled.

The Witness: He bought the north 480 feet of the south 780 feet of the north half of the southwest quarter of Section 10, Township Two North, Range One West, on August 20, 1953, from Frihoff N. Allen, that is F-r-i-h-o-f-f, under Warranty Deed recorded in Docket No. 1396, page 87, with Internal Revenue Stamps affixed to the Deed in the amount of \$6.60.

Mr. LaPrade: Your Honor, before he goes any further, may I have a clarification of your ruling on my objection?

The Court: This has to do with the subdivision. This deals with this subdivision. I will hear what he has to say about it.

The Witness: The second part of the [60] parcel sold at the same time, and was the north half of the southwest quarter of Section 10, except the south 780 feet, sold by the same seller on August

(Testimony of J. Leslie Hansen.)

20, 1953, under Warranty Deed recorded in Docket 1396, page 88, with IRS in the amount of—that is, Internal Revenue Stamps, in the amount of \$6.60 affixed to the deed.

Mr. Joseph Weber is the purchaser, and the subdivision developer and operator as of March 11, 1957, and he told me the price that had been asked, and the down payment required, and that date I have here if I am permitted to tell it.

The Court: Go ahead.

The Witness: It sold for no down payment, \$200 for closing cost, at \$12,000, which is \$198.44 per acre.

Q. (By Mr. Eubank): Now, in the developing, did you talk to him about the development and sale of his subdivision lots?

A. Yes, I did, and got a record of each lot sale that has been made.

Q. What did he tell you about the development of those, of the subdivision?

A. Well, he said that he had sold a certain number of lots, and that there were five or six lots that were sold, and there wasn't too much that he could say, because the [61] record is all here, and I had the information.

* * *

Q. Now, did you use the experience of this residential subdivision in arriving at your highest and best use?

A. Yes, sir, one of the factors that I considered, and I think it is very pertinent.

(Testimony of J. Leslie Hansen.)

Q. And what was your opinion in regard to that subdivision?

A. The history at Luke Field is involved in this process. Luke Field was activated during World War II, [62] became deactivated, then again became activated. [63]

* * *

Q. Tell the jury the—first, are there any other comparable sales that you want to enlighten us on right now before we go into the actual price?

A. You mean as to the quotation?

Q. Yes.

A. In the interest of brevity, I can say that I considered, of the comparisons that we found, which were many, I considered some seven or eight, including the one that I am not allowed to testify on, and including the Luke Field homes subdivision, and considered the sale price on those lots.

I considered the sale of the tracts of land involved in the Goodyear Development that I did, and being acquainted with the history of them back in 1954, because of having made previous appraisals in that area, and knowing what the prices, the sale prices were in 1953 and 1954, and then finding what they were in 1955 and 1956, and in one or two instances in 1957, I believe I found that in my opinion the average value of those farms in that area—

Mr. LaPrade: Wait just a moment.

The Witness: I am not going to give you the amount.—Was a certain dollar amount.

I applied the same criteria as to the desirability

(Testimony of J. Leslie Hansen.)

of the property with its water, as compared with the Adaman [65] Water Irrigation District, and arrived at an opinion of value of the farm as a farm, of the subject Baker-Roach farm, as of March 11, 1957.

Q. (By Mr. Eubank): In other words, by going into these other sales, comparable or similar sales, you were able to arrive at this market value figure on the Roach property?

A. Yes, sir, my opinion of the market.

Q. That is correct? A. Yes, sir.

Q. Of all those sales, are there any specific ones that you feel are very pertinent to our consideration, more so than all the others that you looked into?

A. I would say that the pattern of the whole sets a pretty good trend, so that with the figures involved, the opinion of value sets itself forward rather clearly. [66]

* * *

The Witness: Yes. That figure is approximately \$600 an acre for the farms in the Adaman Irrigation District, with practically an unlimited amount of water, an area that has been sought after by, and invaded by the vegetable growers who have pushed up the price since the 1953-1954 period.

Q. (By Mr. Eubank): Now, do you consider that the lands within the Adaman Water District are inferior or superior to the subject property?

A. In my opinion, they are superior because of their water use, their water situation.

(Testimony of J. Leslie Hansen.)

Q. Does the Baker-Roach farm, to your knowledge, have an unlimited supply of water?

A. No, the Baker-Roach farm, as I understand it, has a limited supply of water.

Q. Do they have enough water to engage in a full potential of agricultural activity, according to the general experience in this valley?

A. Baker-Roach has made very fine use of the water supplies that they have, and the ditch arrangement, cement [67] ditches, and have shown good management.

But I believe that they, in that 80-acre piece, it is practically taken care of by tail water, or sump water that is recirculated.

But I believe they lacked water, sufficient water to properly double-crop the farm in the sense that is typical in the Salt River Valley, with adequate water. [68]

* * *

The Witness: In my opinion, the fair market value of the Roach farm before the taking was approximately \$314,700. That is based on a combination of price for the road frontage property, and a combination of price for the stuff farther back. [69]

* * *

Q. And the value of the remainder after taking, again, please.

A. \$222,080.

Q. Now, if you subtract the value of the entire farm before the taking from the value of the re-

(Testimony of J. Leslie Hansen.)

mainder after the taking, what figure do you have left? A. \$92,680. [70]

* * *

Q. Does the fact that there is C-1 zoning in those two small pieces of land there affect the market value in relation to the rest of it?

A. It is part of my opinion of the market value of the whole, as ascribable to this southern portion of the whole farm.

Q. And you took that into consideration?

A. I did.

Q. And that is why you gave a greater increment of value along the Glendale Avenue?

A. Yes, sir. [72]

* * *

Cross-Examination

By Mr. LaPrade:

* * *

Q. Among them you mentioned the southeast corner of Litchfield Road and Glendale Avenue purchased by one Rubenstein in 1953?

A. Yes, sir.

Q. Did the per acre sale price have any effect on your opinion of this market value, and the use?

A. Yes, it did.

Q. And did the sale price of the lots in the subdivisions farther south on Litchfield Road have any bearing upon your opinion of the market value?

(Testimony of J. Leslie Hansen.)

A. They sure did, yes, sir.

Q. And that was subdivided and purchased back in 1953, [76] wasn't it? A. That is right.

Q. Do you know as a fact that there is a large drainage channel running right through the middle of that subdivided property?

A. Not through the middle, through the west part.

Q. Anyway, it is on both sides?

A. Yes, sir.

Q. And they would have to bridge over it in some fashion? A. That is correct.

Q. And as a matter of fact, you know that that subdivision was a proposition where you bought your lot and cleared it, and provided your own financing?

A. They attempted to sell lots, and they have, and I haven't testified as to the amount, but I have the amount of the sale price. I am familiar with it.

Q. That was a general proposition, wasn't it?

A. Yes, sir.

Q. It was not a situation where a landowner developed his land, built model houses on it, and you walked in and bought the house?

A. You mean FHA?

Q. What we generally consider a housing project.

A. At that time it wouldn't qualify for [77] FHA.

* * *

(Testimony of J. Leslie Hansen.)

Q. Mr. Hansen, as an appraiser, wouldn't you be willing to admit to the jury that it would be a very pertinent factor to any willing buyer or investor to determine first whether this government facility adjacent to the Baker land was going to be a permanent or a temporary thing?

A. I think so. I agree with you.

Q. As a matter of fact, back in 1953, 1954, and 1955, it is very doubtful if anybody would have invested any great sum of money on this, or any other land in that immediate vicinity, for housing purposes, unless he knew that there was going to be an air base there?

A. Mr. Rubenstein bought in 1953 for that possibility.

Q. He bought it pretty cheap, didn't he? [78]

A. I know how much he paid for it.

Q. I will ask you if it is not a fact that when a prospective purchaser examines a given piece of land, and he discovers that it is already zoned for a commercial corner, that might have a considerable amount of weight with him with respect to the value of the land?

A. Yes, I think so.

Q. And particularly in this case do you not know that in March of 1956, the defendants Roach and Baker had those corners rezoned commercially?

A. Yes, sir, I know that.

Q. And it is your opinion that that has no effect on the market value of this land?

A. I didn't say that it didn't.

(Testimony of J. Leslie Hansen.)

Q. To what extent does it, in your opinion?

A. Now you are shooting questions and contradicting your own questions.

Your third question back was do I think that it has a bearing. And I said yes. Now you say do you not think it has a bearing, so I am having difficulty following you.

Q. I was referring to the highest and best use.

A. Yes, sir.

Q. I am now talking about market value.

A. Yes, sir. [79]

Q. Is it your opinion that the fact that the corner had already been rezoned before this government taking has a definite effect on the then market value of this land? A. Yes, sir.

Q. As a matter of fact, it is quite an accomplishment on any given corner where you have what we call section lines?

A. That is right. I took that into consideration.

Q. But you have testified that the Roach-Baker does not have sufficient water to farm it as it possibly could best be farmed?

A. That is my opinion.

Q. Do you know that, sir, or are you just thinking it?

A. I know it from the report from the log of the Hansen Pump Company for the two wells on the property, and from what I can gather, and that is my opinion based on my study.

Q. And if I told you that the static level of water was closer to the surface of the Roach-Baker land

(Testimony of J. Leslie Hansen.)

than it is out in the Adaman Water District, would you argue with me on that?

A. The static water level may or may not have something to do with it.

It will enter into the cost, but I know what [80] the static water level is on these farms as of the last reading by the Hansen Pump Company. I know what are the gallons per minute with the present horsepower motor on the one pump, and what they recommend for it.

I have those factors, and took them into consideration.

Q. Is it not a fact, or do you know that now, and at all times with which we are concerned, the Roach-Baker farm has produced sufficient water to farm every crop that has been ever put on it?

A. To double-crop it?

Q. I am talking about a full production on that farm.

A. In the sense of double-cropping, such as we use in the Salt River Valley, is that your statement?

Q. How about cotton lands? Isn't this farmed in cotton?

A. It has been farmed in cotton.

Q. Do you know whether it has a cotton allotment?

A. I believe it has a cotton allotment.

Q. And that also would have a considerable effect on the value of it as farming land, would it not?

A. Yes, sir. [81]

* * *

Q. If it was established by competent evidence

(Testimony of J. Leslie Hansen.)

here that there was without any question adequate water to farm this land, would that affect your opinion, sir?

A. Yes, I think it would affect my opinion of the fair market value of the farm as a whole.

Q. All right, sir. To be specific, assuming for the purpose of argument——

A. Yes, sir.

Q. That this farm has and did then have adequate water supply.

A. For full double-cropping, or for full cotton cropping?

Q. For any purpose you want.

A. Yes, sir.

Q. What would its market value before the taking have been, in your opinion?

A. It would have increased it by approximately 100 dollars per acre, in comparison with the other farms sold in the area with adequate water.

Q. We are talking about 132.4 acres, sir.

A. No, we are talking about 513 acres or more, or less, the whole farm.

Q. Are you able to give me a figure as to the increase in the difference between the before and after figure, based on that method? [83]

A. Yes, I think I can.

I can give it to you very quickly on the before, and I may need a little time on the after.

The figure before taking, based on an answer to your question, would be \$366,060. It increases it \$51,300, assuming that there is 513 acres, and as I have said before, there is a little variance.

(Testimony of J. Leslie Hansen.)

One deed I think shows 509.76 on one record, and another shows 513, or 516, I believe the deed showed that, and the G.L.O. measurements would indicate 513.

And that is not too important, because it is very difficult to get to a specific point unless you have an accurate survey.

Your question, Mr. LaPrade, is to find the difference, that was \$92,680, and what would it be now with this——

Q. Yes, sir.

A. All right. The figure would be \$105,920, assuming that there was full and adequate water.

Q. Mr. Hansen, you stated that this, the difference of the before and after method, referring now back to your \$92,680 figure on your original opinion.

A. Yes, sir.

Q. Did you include in that any element of severance damages to the balance of the farm? [84]

A. I did not. I considered it, but there is no severance damage on the basis on which I made my valuation.

Q. What in particular about your means of valuation would have eliminated severance damages?

A. Well, you asked the question, and here it comes.

The farm has the value, in my opinion, with the water as I understand it, of \$500 per acre for the whole farm. But because of the zoning and the speculative value of Glendale Avenue frontage, I

(Testimony of J. Leslie Hansen.)

feel that much of the land has a value of \$700 an acre.

So that by breaking it up into the various parts, 40 acres at \$500, 80 acres in the west half of the southwest quarter at \$700 per acre, in Section 2 those two were; and in Section 3, 160 acres in the southeast quarter at \$700 per acre.

And in Section 3 in the northeast quarter, approximately 155.21 acres at \$500 per acre, being north of the half-way line here; and in Section 10, 59.40, part of the northeast of the northeast at \$700 per acre.

Then in Section 34, the south 500 feet of the southwest of the southeast corner, at \$500 per acre. I came to this \$314,760 valuation, which by your question is if there were sufficient water, would be the higher figure of \$366.060.

Now, under the premise that I used, you [85] cannot have a speculative value at a higher value, and still have severance damage, when you enter the farm into the realm of speculative value as well as farm value.

You are sacrificing farm value, you can't have your cake and eat it, and you are sacrificing farm value.

For instance, if this was right for subdivision work, and they took the whole farm, the whole farm would go by the board, such as has happened with thousands of acres in the Salt River Valley.

When the price of the land reaches the proportions of subdivision land, it no longer has value as farm

(Testimony of J. Leslie Hansen.)

land. You can't just say we are damaged for the rest of it for farming, because we have sold off for a speculative value, and on that basis I don't feel there is any severance damage applying to the remainder of the farm.

Q. Do I take it it is your testimony that when the Government gets through taking this land, the remainder of the land is no longer farm land?

A. No, I didn't say that.

Q. Then that is still farm land, isn't it?

A. Yes.

Q. As a matter of fact, your whole theory is predicated on farm values?

A. Farm and speculative values.

Q. Now, for the purpose of describing to the jury, am [86] I accurate when I say that the farm which is left after the taking is this piece I am designating, that is, the northeast quarter of the—the north half of the east half of Section 3, and the west half of the west half of Section 2, and this approximate 56-acre figure in Section 10?

A. That is correct.

Q. So that we now have instead of one large unified farming operation, we have one tract of land here, and we have, to get down to the southern piece, you have to go half a mile, don't you?

A. You always had to go that way, Mr. [87] LaPrade.

* * *

Q. Let us talk about tail water for a minute.

(Testimony of J. Leslie Hansen.)

I believe it was your testimony that it was your understanding that this piece here that is on the east side of Dysart Road, which you referred to as approximately 80 acres, and for the record may I correct you, and wouldn't that be approximately 120 acres? A. That may be.

Q. It was your testimony that it was your understanding that it was primarily irrigated from the use of tail water? A. 80 acres of that is.

Q. Yes, that would be more accurate. By way of explanation for the jury, you are saying that the tail water from the farming of this piece, which is the land that is being taken, plus that quarter section north of it, probably is over into a sump which is indicated on this photograph, and is again pumped up on this 80 acres?

A. That is right.

Q. In other words, they pump the water once, and they use it, and it flows by gravity into a sump, and they pump it out and use it again?

A. Yes.

Q. Is that what you say, sir? [88]

A. Yes. Now, then, I also want to point out that they now have more water for these lands than they had before, because this is being taken out of their water supply and allows more water for these lands, and, strictly speaking, I should have taken that into consideration in arriving at the remaining value, which I did not.

Q. Mr. Hansen, do you know how they get water

(Testimony of J. Leslie Hansen.)

onto this east 80 acres now, or that portion of it which was formerly irrigated by tail water?

A. Under the new arrangement?

Q. Yes. A. No, I do not.

Q. Have you made an effort to find that out?

A. I understand that the Corps of Engineers is doing something to find out about underground water, but I don't know what it is, as such.

Q. If they no longer have the use of their own tail water on the piece that the Government is taking, then they have that much less tail water going into that sump, isn't that right?

A. That is right.

Q. True. They still have the water underground which they haven't had to pump? A. Right.

Q. Then, sir, if it took all of the tail water [89] that they formerly had to irrigate the east 80, and now they don't have that much tail water, then they would have to pump more water out of their original pumps, wouldn't they? A. That is right.

Q. Do you know how much an acre-foot it costs to pump water?

A. It varies with the depth and the type of equipment.

Q. Do you know how much an acre-foot on the average in farming business it costs to irrigate land?

A. I wouldn't like to volunteer a statement on it, because I couldn't answer it accurately.

Q. Don't you think it would have been more reasonable for you to have determined whether they

(Testimony of J. Leslie Hansen.)

were going to have sufficient water to irrigate that east 80, in arriving at your after value?

A. I felt that they had sufficient water, because of the taking out of the 132 acres.

Q. You see what I am talking about?

A. Yes, I do.

Q. They have to pump it twice, in other words, now, once out of the pump down into the sump, and pump it again up to irrigate it.

A. You mean that it is now going to cost them less, is that what you are telling me, less to pump it direct from the well than to pump it here? [90]

* * *

Q. I don't know, perhaps you didn't understand my question. Formerly they pumped water, and it was used on this land, and then by gravity went over to the sump? A. Yes.

Q. And they pumped it again and used it again?

A. That is right, yes.

Q. That was the system. Now, if they don't have half, assuming they have now approximately half as much tail water, then there is just about half as much water that gets into the sump, isn't there?

Do you know whether that happens to be enough water to irrigate that 80 acres?

A. I would doubt that it would be. I don't know.

Q. If it is a fact, and I proved that it wasn't near enough, and they didn't have enough water in the sump to irrigate that 80, the only solution would be to pump additional [91] water directly

(Testimony of J. Leslie Hansen.)

from their pumps on the north end of the farm directly into the sump, and then pump it again in order to—— [92]

* * *

Q. And in examining the land, and in making a determination as to the market value of the balance of this farm after the taking, I can assume, then, that you did not make a thorough investigation as to the irrigation set-up that the farmers would then be faced with?

A. I gave consideration to the irrigation factors, and in my opinion had determined that they would have sufficient water.

As to the additional cost for the pumping that they save now by their excellent management, I didn't consider it in dollars and cents, but only in the general comparison with the farming situation in which water is either pumped or furnished.

Q. Sir, in determining the market value of a given [95] farm, would it not be of interest to a prospective purchaser to determine the particular fertility of the soil involved, and the prior record of production on that particular farm?

A. Yes.

* * *

Q. Are you familiar with the usual or ordinary production on a cotton farm in this valley?

A. I think I am.

Q. Would you consider in excess of three bales an acre an average per year very good or very bad?

(Testimony of J. Leslie Hansen.)

A. I would think it was almost to the point of bragging.

Q. And if I were to show you the gin receipts from the J. G. Boswell Company, showing that over a three year period this ranch exceeded in excess of over three bales per acre on their base cotton allotment, would you be satisfied that this was a pretty good farm?

A. I would want to know more of the details, Mr. LaPrade.

I would want to know whether they skip rowed, and what they considered for their acreage, and all the factors that went into this. [96]

* * *

Q. (By Mr. LaPrade): You have testified that the market value of the remainder of this ranch, and as we observe from the aerial map, you now have left a piece of land approximately 56 or 60 acres on the south side of [97] Glendale Avenue, and you have approximately 120 acres on the east side of Dysart, north of Glendale, and then half a mile up we have approximately another quarter section of land, roughly.

Wouldn't you call that a three-piece disconnected farm?

A. In the sense that you are referring to it, I will agree with you that it is not a contiguous operation. But it is reasonably contiguous, and the operation of this farm, and this farm, and this piece of land, and this piece of land present no difficul-

(Testimony of J. Leslie Hansen.)

ties as compared with the previous operation, so far as efficiency is concerned.

It is true that when you are working this piece and had equipment left here, they wouldn't have to move it far to operate this farm.

Conversely, they won't have to move it far when they take it from here to here. I think the farm is reasonably efficient in operation, even though it is divided as it is, but it is so connected; as contrasted to a farm that might be separated by half a mile of going in a circuitous route and roads to get around, this is practically direct access.

Q. Do you know anything about crop dusting on a farm? A. Not a great deal.

Q. Are you familiar with the types of poisons that [98] are used by farming agents in this Valley in the crop dusting of cotton crops?

A. I have some knowledge of it, but not intimate knowledge.

Q. You know it is of a dangerous nature, and must be carefully handled, don't you?

A. I believe that is the fact. I read a recent statement to the effect that the most deadly one under proper conditions is safe, but under improper conditions is not.

Q. You have heard testimony where a Capehart Housing Project is being constructed on the land contemplated being taken from the land of Roach and Baker, of approximately, I think the testimony is, seven or eight hundred thousand. I am not sure what the testimony was now in that respect.

(Testimony of J. Leslie Hansen.)

Did you take into consideration in arriving at your after value that there was going to be a housing project in the middle of this farm, and that it might have some effect on whether or not the farmer could thereafter crop dust his farm?

A. Yes, I considered it and thought about it, and couldn't arrive at an opinion about it.

Q. So you have eliminated that element entirely in arriving at your figure?

A. No. Because there are so many ways of dusting, or so many ways of killing bugs, and certainly the lowest [99] price is the matter of crop dusting by air, and I think there are so many elements that go into the crop dusting of this particular farm, with the close proximity of Luke Field, that whether or not this was taken, or whether it would stay was a matter of conjecture, and I didn't go into that too deeply.

Q. Do you have any idea what the ultimate result would be when a big gust of wind blew a big cloud of this poisonous dust into the middle of a housing project?

A. I believe it would be quite disastrous, and rather unpleasant.

Q. As a matter of fact, they might be thereafter precluded from dusting, and, therefore, perhaps precluded from farming their land?

A. Not from farming, but from dusting.

Q. Do you think a cotton gin would loan a farmer money if they thought he couldn't dust his crop?

(Testimony of J. Leslie Hansen.)

A. He can dust his cotton crop without doing it by air.

Q. Did you go into how much more it would cost to do it by rig than it would cost by air?

A. No; I didn't.

Q. Did you think that these factors I am talking about might be considered by a prospective purchaser in the open market, as to what the value of the remainder of the ranch [100] would be?

A. I did not give any specific consideration, for the reasons that I have previously stated. [101]

* * *

Q. Mr. Hansen, referring to Defendants' Exhibit A in evidence, I will ask you to note that on the left-hand side of this document there is a jotted diagonal line, and above it written in, "Noise Clearance Zone."

Do you know what that represents, sir? [102]

A. I believe that it represents the zone that is being dedicated, indicating that the Government will probably in the future take land within that area, or buy it, so that they are not bothered by the noise clearance.

Q. In other words, you will note, sir, on the left-hand corner of the entire tract which is being constructed on by the Government, including the land being taken from these Defendants, there is a corner cut off.

Do you know what that would—and I point out to you just below where it is written "noise clearance," do you know what that would be for?

(Testimony of J. Leslie Hansen.)

A. Do you mean why the corner is taken from this?

Q. Yes.

A. I don't know, but I presume it would be to keep it out of the noise clearance zone.

Q. I refer you again to the subdivision which you talked about yesterday as a comparable piece of land to the land in question on Litchfield Road, and I will ask you whether that subdivision is not within the noise clearance zone?

A. That I can't tell you. I presume it is, but I can't tell you.

Q. When you used that as a comparable sale in arriving at your opinion of value of the land in question in this case, did you make an effort to determine whether that [103] subdivision was within the noise zone?

A. No, I did not, because I didn't use it in that basis. I used it as a basis of the possibility, or the futility of residential development in the area.

Q. Did you make that same investigation with regard to the Rubenstein corner on Litchfield and Glendale?

A. No; I did not.

Q. As a professional appraiser, sir, would it be your opinion that the proximity of a residence to a noise zone created by aircraft wouldn't be a factor in determining whether a person would buy?

A. Yes.

Q. In determining in your opinion the highest and best use to which the Defendants' land could have been put, did you make a study of whether it

(Testimony of J. Leslie Hansen.)

was within or without a noise barrier or zone adjacent to this air base?

A. No; I did not, because it was not a part of the consideration as to the highest and best use of the land, in my opinion.

Q. Do you know whether the Defendants' land, tract H-801, is within or without the noise clearance zone as created by the Government?

A. As far as I know, it is without the noise clearance zone, and I wouldn't have known about the noise clearance zone except that I have casually seen some plats. [104]

Q. These plats, engineering drawings indicate that there is a noise clearance zone?

A. That there is to be a noise clearance zone.

Q. Would that be termed, for our purposes here, a safety zone to stay without? Is that how, in your terms, you would best describe that factor of proximity?

A. It is called a noise clearance zone. And because it did not enter into my analysis of this property, I did not go into it.

Q. You also stated that you used as comparable values land which is west of Luke Air Force Base?

A. Yes.

Q. How far west is the land you are referring to, sir?

A. Most of them are on the road immediately west of Luke Field, one mile, or just at the west periphery, and one section of land that is a mile farther west than that.

(Testimony of J. Leslie Hansen.)

Q. That was farm land, sir? A. Yes, sir.

Q. In your opinion? A. Yes, sir.

Q. Do you know where the entrance to Luke Air Force Base is?

A. As of March 11, 1957?

Q. Yes. A. Yes. [105]

Q. Can you designate for the Jury on the map to your right, which is Government's Exhibit 1 in evidence, where that is on the map?

A. This is Glendale Avenue. The entrance is here just north of Glendale Avenue.

Q. Is there any main entrance from the air base, and headed west to the land you compared it to?

A. No.

Q. How would one go from Glendale, Arizona, to the land you are talking about?

A. Glendale Avenue is at the north end of Luke Field and west, and then south.

Or, if you wanted to travel the country road west of the first road that has been cut off now of Luke Field, they could go to the second road, and come north.

Q. Then, sir, there is no main artery from the populated area of this valley direct to the land you compared, is there?

A. Such as Glendale Avenue direct into it?

Q. Yes. A. No, sir. [106]

* * *

Q. Sir, you testified to comparable values on sales made in 1953.

I ask you this question: Do you have an opinion

(Testimony of J. Leslie Hansen.)

as an expert appraiser as to whether values generally for any given purpose in this Valley have increased or decreased since 1953?

A. In my opinion, they have increased.

Q. To what extent, or can you generalize on that point?

A. I can generalize. In some areas they have increased in great proportions. In some areas they have remained static entirely.

And in some areas they have increased moderately. When you say 1953, if I may, I included 1953 and 1954 in the same period.

Q. Yes.

A. I found by my search that farms in this area west of Luke Field have increased in market price approximately 50 per cent since 1953-1954. [107]

Q. You stated on direct testimony yesterday that it has been a very difficult problem all over the country in connection with building subdivisions at or about government air facilities.

I refer you to Davis-Monthan Air Base at Tucson, Arizona.

Are you familiar with the housing situation there? A. Yes.

Q. Is it not a fact that there are numerous privately promoted subdivisions completely built in, at, or about Luke Air Force Base—I mean, pardon me, Davis-Monthan Air Force Base?

A. There are, in fact, I have set the value and appraised both for government and for private investors on acreage right up and adjacent to the

(Testimony of J. Leslie Hansen.)

clearance zone north of the fence of Davis-Monthan Air Force Base, and there is private housing occupied by not necessarily Davis-Monthan people, but people in the expanding Tucson area, because Davis-Monthan is in the close area of the expansion of Tucson.

Q. And those housing developments, sir, are they not between the air facility and the center of the population? A. Yes, sir.

Q. There are none of them on the opposite side of the air facility, are they? [108]

A. Not that I know of.

* * *

Q. I am speaking of the cost per acre-foot.

A. I would say the cost in the Adaman Irrigation District was greater than for the amount of water pumped for each one, limiting the Adaman to the same amount that the Roach-Baker would be limited. It would be greater in the Adaman district because of their charge per acre-foot per [109] year.

* * *

Q. Do you know whether Baker and Roach have taken complete advantage of all their underground water supplies with the wells they presently have?

A. I believe that they would get, if they put in, according to the pump company's records, an 85 horsepower motor on the one pump, they would

(Testimony of J. Leslie Hansen.)

get 750 or 930 gallons per minute, and they now have a 75 horse motor on it.

They could increase the flow on that one pump by a heavier motor, according to the report.

Q. That would be a substantial increase in the amount of available water, would it not, by merely changing the type of equipment they are using on the wells? [110]

* * *

But it is not reasonable to assume that they can get sufficient water from that well to the north on a shared basis with the owner of that land to take care of some 200 or more acres with proper water supply.

I don't vouchsafe that these are accurate reports. These are from what I could gather. And based on this information, the Roach-Baker farm is in an inadequate water supply basis, as compared to the Adaman Irrigation District.

Q. Perhaps, then, for the Jury's information, there is no question but what this farm in its entirety is within what we call the critical water area, as designated by the State Land Commission?

A. That is my understanding.

Q. And with the exception of replacement wells to replace a lost well, under the law, as you understand it, they would not be able to drill any additional wells?

A. That is the way I understand it.

Q. So if they were to be faced with a selling

(Testimony of J. Leslie Hansen.)

of the balance of the farm after the taking, they would have to [112] sell their entire holdings or else there would be no available water for any piece they held back, would there?

A. Yes, I imagine they could make an arrangement. But they are getting water now from a well now, on their arrangement. I don't know what arrangement they could make.

Q. Let me phrase it again, sir.

If in the market, after the taking, they were to sell the balance of their farm, and they were unable to find a buyer for anything under the northeast quarter of Section 3, which I am designating principally here, then you would after a sale have two different owners, wouldn't you? That is, Roach and Baker would have retained the south piece and the east piece, and the new owner would own the piece of property with the wells on it?

A. Conceivably any such split-up could be arranged.

Q. Then Mr. Baker and Mr. Roach would have what you term farm land without any water development on their land, wouldn't they?

A. When the water is not available, it ceases to become farm land.

Q. That's correct. That is my point, sir.

A. Yes.

Q. Then for all practical purposes in the market they would have to sell their entire holdings at once to make complete advantage of the use of the land, wouldn't they? [113]

A. No. No.

(Testimony of J. Leslie Hansen.)

Q. But you don't mean to intimate that anybody would buy either the south piece or the east piece without developed water?

A. They could have developed water.

Q. From what source?

A. Certainly, Mr. LaPrade, you are familiar with the fact that they could sell this piece, and sell a percentage of interest in the wells, a 22nd or 31st, or whatever it may be. That is not an uncommon practice.

I can cite you instances that I have made appraisals where farms have a 1/22 and a 1/31 interest in a well, and get water according as their interest may appear. That is a rather common thing.

* * *

Q. You also stated that you were predicating your [114] opinion on a comparable sale of land east of the property in question.

Where was that piece of land?

A. May I enlarge on that just a little?

Q. I want to know where it is generally.

A. The land in question is just a quarter of a mile south of Glendale Avenue in this area on the desert.

There were two sales in there that I considered. But I had about 15 or 18 sales in the whole area. Of course, there is an awful lot of land out there.

Q. Sir, was that particular land cultivated?

A. No; that was desert land.

(Testimony of J. Leslie Hansen.)

Q. That was desert land? A. Yes, sir.

Q. That was the land the sale of which you termed as comparable?

A. No; I say that it was part of the sales that I got in my search. I couldn't go and pick out lands definitely pertinent to it. I had to find any sales in the area anywhere around, and then make the search of those that were comparable.

Q. Was any of this other land fronted on Glendale Avenue? A. No, sir.

Q. Was any of it fronted on Luke Field?

A. No, sir. [115]

Q. Was any of it in the year 1957?

A. Yes. Some of the sales were in 1957. Some were subsequent to the March 11th date, and I couldn't entertain them for the purpose of this trial.

Q. To clarify generally, your entire testimony, Mr. Hansen, I take it, then, that in your opinion the market value of this land after the taking, in terms of dollars and cents, did not include any element of what we term severance damages?

A. That statement isn't quite correct. I considered severance damages as to whether or not there was severance damage in applying under the premise that I was working in determining my opinion of the value, and because of ascribing a greater value to the land on the Glendale Avenue side of this farm, \$200 per acre more for the land in this part than for the land a half a mile to the north, I

(Testimony of J. Leslie Hansen.)

felt that, as I explained yesterday, that something like you can't have your cake and eat it.

If they have a speculative value, it pays to sell, and that takes care of whatever severance damage there may be. So I report no severance damage because of the difference, in my opinion, in the two plots.

Q. In your opinion, there is no value of this farm for the taking for any other purpose other than as farm land? [116]

A. That isn't what I said, Mr. LaPrade.

Q. Other than the slight speculative element which you have added on the frontage on Glendale Avenue?

A. Yes, sir; that is my opinion.

Q. Your information concerning the Roach-Baker wells, did you know that they had been tested to a maximum production of 3700 gallons per minute?

A. Not according to the information I have, sir.

Q. If that was the fact, as I assumed in my last question, rather than the information at your disposal, your opinion of the water supply might be in error?

A. If that is a fact, that these wells produce in practical practice 3700 gallons of water per minute, my opinion of the value as I have it would be increased.

Mr. LaPrade: That is all. [117]

(Testimony of J. Leslie Hansen.)

Redirect Examination

By Mr. Eubank:

* * *

Q. Now, in regard to the water and this crop testimony. It is my understanding that your testimony is that after the taking by the Government of the 132.60 acres, that there should be, in your understanding, sufficient water available then to double-crop the land, is that correct?

A. I didn't make that statement, Mr. Eubank, but there will be considerably more water available for the remaining land, by virtue of the fact that there would be 132 acres deducted from the productive portion of the farm. [119]

* * *

Q. Are you familiar with the Military Housing Act? A. Yes, sir.

Q. And are you familiar with what is known as the Wherry Housing Act?

A. There are three branches of housing covering military housing.

Q. Name the three, if you can.

A. The Wherry Act, which is now obsolete; the Capehart Housing Act, and the Defense Housing Act.

Q. Were those in existence on March 11, 1957?

A. The Wherry Housing Act, the last act, the Capehart [123] Act, which was the last act passed, provides that where a base has Wherry Housing

(Testimony of J. Leslie Hansen.)

and Capehart Housing is to go in, that the Wherry Housing projects must be sold to the Government, that is, the builders' interest, so that there is no more building under the Wherry Housing Act, but there is building under the Defense Housing and the Capehart Housing Act.

Q. In your consideration of this property, and your declination of the idea that it is residential, did these Acts play any part, in your opinion?

A. A major part.

Q. In what respect?

A. These acts were on the books for the purpose of providing housing to the bases.

Because of the lack of soundness in investment to the private builder, there has been little or no private building of housing in the vicinity of the military bases, the exception being, perhaps, in the state of Arizona, definitely Davis-Monthan, because of its proximity to Tucson, and the expansion of Tucson towards the Hughes Plant, and in the desert area south and east of Tucson where the development has taken place.

Private capital has not gone in, and in order to provide housing, the Government has provided for housing for military and civilian personnel at these bases, and the [24] housing is guaranteed under the Federal Housing Administration Act on a 100 per cent guarantee.

Q. Guarantee the actual building costs, is that correct?

A. That is correct. The value of the property,

(Testimony of J. Leslie Hansen.)

the FHA furnishes 100 per cent, and they under some of the regulations set the rent in connection with the military installation, and in others the military does, but it is based on a definite Congressional prescribed rate of return of investment.

Q. Now, you have heard testimony also to the effect that this base is now permanent?

A. Yes, sir.

Q. Do you recall that? A. Yes, sir.

Q. Did you take into consideration any risk factor, and the fact that Luke Field is a Government air base? A. I did.

Q. In what respect?

A. Luke Field is growing, and Luke Field is now going to have another facility of some 10 million dollars expansion, and it is going to be greater than it has been.

Luke Field, prior to the formal declaration of permanency, was about as active as it is now as far as personnel are concerned and people being there, but inasmuch [125] as it is created by an act of Congress, an act of Congress can deactivate it.

Our defense effort can change due to war conditions, and it is a military installation, and that is the background of why private capital does not go in for these areas.

Q. Do you think it's sound, or it would be sound for an investor to invest money on the basis of personnel at Luke Field?

A. No, sir. Not in the face of competition of Capehart housing. [126]

(Testimony of J. Leslie Hansen.)

* * *

Q. Mr. Hansen, would you tell us why at this time you think that the Rubenstein sale was an indicator of market, although the sale occurred in 1953?

A. I don't believe that I said that the Rubenstein sale was an indicator of market, but that I used it as a basis of comparison in using the price he paid for it, as [128] compared with the price of the farm lands in the area, the price that Baker-Roach paid for the land in December, 1953, the price that the farmers west of Luke Field paid for their farms in 1953, and performed in my mind, or, rather, concluded in my mind a percentage of ratio of, and I am not going to mention dollar amounts, Mr. LaPrade—an amount of ratio of this farm as compared with these.

This was in percentages. I would like to not use the actual percentages, but let us say these might be 100 per cent, and these would be 100-plus per cent, because it sold at a greater price in 1953 than these others did, and that this did.

Q. By the others, you mean farms in the Adaman Irrigation District?

A. In the Adaman Irrigation District, and the subject farm, and I performed a ratio in my mind of percentage of how much better this one was from a market standpoint than this, and then because of the reactivating, and the greater activity of Luke Field, and the speculative trend that will continue

(Testimony of J. Leslie Hansen.)

along Glendale Avenue, I readjusted that figure so that I got a percentage of how much this was, of what I thought this was, and then in my mind I determined what I thought the value of this piece was as of March 11, 1957, and that was part of the process that I used in arriving at my opinion of value. [129]

* * *

Recross-Examination

By Mr. LaPrade:

Q. You testified, Mr. Hansen, that this little subdivision on this field which you have circled on Government's Exhibit 1, that the lots sold at \$600 apiece?

A. Some of the residential lots, yes, sold at \$600.

Q. How many lots were there per acre?

A. Approximately 4 and a third. There is approximately [130] 224 acres in the plotted subdivision. I have the plat here.

Q. Were the lots placed on the market, the land, that is, was placed on the market at the average of approximately \$2400 per acre, figuring each lot in that acre?

A. That would be if you reduced it to that sort of a term, yes, sir.

Q. And some of them did sell in 1953?

A. I will give you the dates on every sale, if you want, and the docket and the page.

Q. All right.

(Testimony of J. Leslie Hansen.)

A. The earliest sale I find is 1954, August 20, 1954.

Q. This is the subdivision that you referred to yesterday as being a program whereby the owner subdivided, sold individual lots to prospective purchasers who were buying unimproved land, and would be required to produce their own financing?

A. You brought that out by questioning.

Q. That was the fact of the matter?

A. That, I believe, is the fact, yes, sir.

Q. This wasn't an enlarged subdivision where a developer had come in and put in streets and curbs, and had provided mortgage-backed financing, and had an opportunity for a prospective purchaser to buy a home lock, stock and barrel, as we commonly know subdivision developments?

A. No, it is not. [131]

Q. In this day and age, was it?

A. No, it was not.

Q. And yet even commencing in 1953, the \$2400 figure was set per acre after the land had been subdivided into lots?

A. Well, now, that isn't—

Mr. Eubank: I object to that, your Honor. I don't think that was his testimony at all.

The Court: The witness is going to answer. He was asked a question.

The Witness: That is somewhat of a mis-statement, Mr. LaPrade.

Q. (By Mr. LaPrade): Clarify it.

(Testimony of J. Leslie Hansen.)

A. Yes. I will be glad to. Thank you for allowing me to.

When a man agrees to pay \$600 for a lot, and puts \$10 down, he is always going to pay considerably more than he would were he buying that lot for cash, and these people have agreed, and the fact that I took into consideration that to date only a certain number have been sold doesn't conclude that these lots are selling on the basis of \$2400 per acre. Far from it.

But it does indicate that these people have agreed to purchase, and many of them, I would imagine, even as you or I might, would do it for a speculative purpose, we put [132] a small amount of money down, and if it goes up we have got something, and if it doesn't, we can always let it go, so I wouldn't say that it is \$2400 an acre as evidenced by these sales. [133]

* * *

R. R. McGREW

witness for the Defendants, having been previously duly sworn, resumed the stand and testified further as follows: [134]

Direct Examination

(Continued)

By Mr. LaPrade:

* * *

Q. Would you clarify that for the Jury's benefit as to what is the noise clearance zone, and what part it plays in arriving at your personal opinion?

(Testimony of R. R. McGrew.)

A. Well, the noise clearance zone is an area in which there is a possibility and fact that noise is created from military planes landing and taking off, and making turning movements.

And, of course, any housing that would go within that zone would be subject to those noises, and if the property were not in that zone, it would naturally be more adaptable for residential use, and consequently more valuable for that purpose.

Q. I refer you to Government's Exhibit 1 in evidence, and I am pointing now to the Tract H-801, the land being taken by the Government, and ask you this:

Do you have an opinion as to whether that particular tract of land is more or less desirable for the use to which you have subscribed than the land immediately west of it, which is closer to the air base?

A. I think it is more valuable, because it is that much further away from the noise clearance zone, still it is close enough to the air facility to serve the purpose for close housing.

Q. I will ask you to examine the area I am pointing to on this same exhibit, outlined in red, farther south, on [136] the east side of Litchfield Road, which has been testified to as a subdivision created in 1953.

Do you have an opinion as to whether the success of that project might have been affected by its proximity to the noise zone to which you have referred?

(Testimony of R. R. McGrew.)

A. I think there is a possibility.

However, I think there was a greater effect on it than that.

Q. What would that be?

A. That is the effect that the project in question is being undertaken, and naturally competing with that.

As a private enterprise, it is too hard to compete, and consequently it hasn't moved as well as if that project was not contemplated and in the [137] making.

Q. I note that Tract H-801 is not colored in in green as in Defendants' Exhibit A in evidence.

Do you have that accurately drawn out so that the Jury may determine which is the remaining land?

A. Yes, because on this map the part that is colored green is the remaining land. Plus the part marked "School," and the part that is not colored green within the heavy boundary of the property is the portion of the Baker-Roach property that is in the project.

Q. And you have the entire outside boundary, of the entire Roach-Baker holdings——

A. In a heavy broken line.

Q. Heavy broken line?

A. That is right. [138]

(Testimony of R. R. McGrew.)

Cross-Examination

By Mr. Eubank:

* * *

A. When I am referring to highest and best use, I am talking about the use that would result in a permanent development of any area, or the final economic use for the [139] property within a reasonable time, of course. You can't predicate a hundred years, but I mean within a reasonable time, the best economic use for a piece of property.

* * *

Q. Now, you did testify that one of the factors that [140] led you to the opinion that the highest and best use of that property was residential was the fact that there was a trailer court that had just gone in on Glendale Avenue, do you recall that?

A. Yes, sir.

Q. I asked you where I am pointing on Government's Exhibit 1 for identification if that isn't the trailer court that you were referring to?

A. I believe that is the trailer court in a partial stage of completion, or of development.

Q. Isn't it true that that trailer court was not there on March 11, 1957?

A. I am not certain; I believe it had been approved for zoning at that time. The actual construction may not have taken place. I am not aware just when it was started, but I am pretty certain

(Testimony of R. R. McGrew.)

that the zoning had been approved at that time for the trailer court.

Q. Would you take this and circle the trailer court? A. As it exists on this photo?

Q. Yes. [141]

* * *

BERT CAVANAGH

called as a witness in behalf of the Defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. LaPrade:

* * *

Q. What is your occupation?

A. Real estate broker, appraiser, builder, and I also run a finance company.

* * *

Q. How long have you been in the real estate business in Phoenix, Arizona?

A. Since 1942.

Q. Prior to then, what was your experience in this field? [144]

A. I started in the real estate appraising and building business in Chicago in 1919.

Q. Describe briefly your activities in that regard.

A. I rented three offices in Chicago, one in the downtown area, one in the north part of Chicago,

(Testimony of Bert Cavanagh.)

and one in the south part, and I constructed, or built hundreds of buildings, investment properties, also had subdivisions, and then had a general brokerage business, insurance and appraising.

Q. When did you leave Chicago? When was that, sir? A. I left Chicago in 1934.

* * *

Q. Have you ever had occasion to give instruction in real estate appraisal work?

A. Yes; I did.

Q. Describe it briefly.

A. We had a co-operative group in Chicago for a number of years of the realtors from the south part of Chicago. We had an educational program, and all of us combined, and we would take different phases. One fellow would give instruction [145] on real estate, one on appraising, another on marketing, another fellow on housing investment, and I specialized on investment and appraising.

* * *

A. I started with A. D. McClain in 1942, and I became sales manager in 1944.

Then I opened my own office, and, in fact, I had three offices. I had 39 salesmen, and conducted a general brokerage, appraisal, insurance, and I was also consultant for investors, and a lot of my customers are out-of-state people, and I go back east

(Testimony of Bert Cavanagh.)

quite a bit, and I consult with them on what I think are good investments in this Phoenix area.

Q. In your experience in that regard, have you had occasion to be called upon or employed to appraise lands for any given testimony?

A. Yes, I have. [146]

* * *

Q. Are you familiar with the land at or about Luke Field, Arizona? A. Yes, sir.

Q. Have you ever had occasion to testify as a witness concerning the appraisal of lands in courts in this state? A. Yes, I have.

Q. Where is that?

A. I have appeared in various courts. I never have in federal courts, but I have in the superior courts.

Q. Have you had occasion to acquaint yourself over the years with the residential subdivision business in this Valley? A. Yes, sir.

Q. In that particular regard, what has been your general area of experience and your [147] contact?

* * *

Q. When did you first become familiar with this particular land?

A. About 1943, I had three boys that went through Luke Field, and they graduated there, so I used to go with them quite often, and my son-in-

(Testimony of Bert Cavanagh.)

law was also an instructor out there, so I, myself, personally became interested in that area, thinking that it had great potential for housing [150] development.

Q. Sir, in your opinion, what are the factors which have the important play in determining what the highest and best use to which any given land can be devoted?

A. Well, in a piece of property such as that, you would first look for its general location with respect to, say, for instance, like the City of Glendale, the City of Litchfield, City of Phoenix, then the next thing is its accessibility to highways coming from centers of population.

The next thing would be its location in the area in which potential growth would possibly be coming.

The next thing is the size of the plot of land that is available for use. The type of land, whether it was rocky, whether the terrain is easy to build on, or whether it is something that is very like, if you have got a lot of caliche, that would make it very expensive to build on.

Then you would look for the accessibility of your utilities, whether there are any schools, churches, or shopping centers within the area.

And in this particular case, I would say here that it was very important, because you have a captive sales. [151]

(Testimony of Bert Cavanagh.)

Q. (By Mr. LaPrade): Mr. Cavanagh, what are the particular factors in connection with Tract H-801 which you have personally considered as having a bearing upon the highest and best use to which that land could be devoted on March 11, 1957?

A. The very important thing is the fact that you are close to a source of sales.

Q. What is that, sir?

A. That is Luke Field. The fact that there is very little housing that can be had closer than possibly four miles on the south, and possibly seven miles on the east, eight miles on the east, with the exception of one subdivision which was about a quarter of a mile south of Glendale Avenue on the east side of Litchfield Road.

And I never considered that as much competition to a builder, because of the fact that was being accomplished on a very difficult method of selling your lots first, then having the individual get his own financing. The fact that [152] the roads and the other utilities were not put in leaves it in a rather dishevelled condition, and the fact that there was a wash through the property, and that it was closer to the sound area or noise developing from the flying and the testing of motors at Luke Air Force Base.

Q. What other factors in connection with the Tract H-801 did you consider?

A. I considered the fact that there was a large enough area to make it important enough for a

(Testimony of Bert Cavanagh.)

builder to feel that he could take and go out there and do a good substantial deal.

The fact that the land was level, the fact that there was water available, and that there were other utilities available, and that there was, in my opinion, a crying need for housing.

Q. Were you acquainted with the zoning on this property at the time you were familiarizing yourself with all of these different factors?

A. Yes, sir.

Q. And what was that?

A. The zoning was unrestricted for the main part of the farm, and there was an area on the southwest and the northwest corners of Dysart and Glendale that were approximately 300 feet square zoned C-1.

Q. Did that have any influence upon your opinion of [153] the use to which this land could be devoted? A. Yes, sir.

Q. Are you referring now to your examination of the entire Roach-Baker Ranch, or merely the tract which was taken?

A. My study was with the entire Baker Ranch, but in reality the greatest source I felt of value was in the southeast quarter, which is that property which is facing Glendale Avenue and Dysart Road, consisting of approximately, well, there was approximately 160 acres, and about 19 acres, plus or minus, was sold out of this property, so it leaves about, oh, around probably 140 acres that was being seriously considered for a housing project, in my

(Testimony of Bert Cavanagh.)

estimation.

Q. Have you made a determination as to how the land could have best been devoted?

A. Yes, sir.

Q. That is, to be more particular, sir, have you arrived at an opinion as to what the highest and best use to which Tract H-801 could have been devoted on March 11, 1957?

A. It would be a housing development—— [154]

* * *

The Witness: What was the answer again?

Q. (By Mr. LaPrade): Have you arrived at an opinion as to what the highest and best use to which Tract H-801 could have been devoted on March 11, 1957, or within the reasonably near future thereafter?

A. Yes, sir.

Q. What is that opinion?

A. That it would be for a housing development, multiple unit development, and for a commercial shopping center.

Q. Where would the shopping center be?

A. The commercial shopping center that I would suggest would be 20 acres running on the southeast corner of the southeast corner of this section running approximately 660 feet north and south on Dysart, and approximately 1295 feet on Glendale Avenue, running from the corner of Dysart west. That would be approximately 20 acres.

Q. In other words, your recommendation on

(Testimony of Bert Cavanagh.)

that point would include more commercial acreage than they actually had zoned? A. Yes, sir.

Q. But for the highest and best use, that was your opinion of how you would devote the land?

A. Yes; that is what I figured it should be developed for its best use. The immediate west of this particular 20 acres I would zone and have built multiple units in 10 acres [155] fronting on Glendale Avenue, that would have approximately 1320 feet along Glendale Avenue, and approximately 330 feet deep.

Q. Have you drawn a little map or tract drawing of the use to which you would put it?

A. Yes, sir.

Q. May I see it, sir?

A. Yes. (Handing to counsel.)

Q. I note that on this document, which will be designated Defendants' Exhibit F for identification, that you have included therein figures indicating what apparently is acreage.

Will you explain what this document represents to the Jury?

A. This which is known as my exhibit, I had it Exhibit "A," consists, at the southeast quarter of Section 3, Township 2 North, Range 1 West, and I have it broken up into that area which I felt that as of March, 1957, would be its best development.

The use for which I figured was its best. I have taken and indicated the area which was out because it had been sold to the school, and then I took and developed here the 20 acres for the shopping, the

(Testimony of Bert Cavanagh.)

10 acres for the multiple dwelling, and the balance of the acreage for housing, possibly R-2. [156]

Q. Mr. Cavanagh, under ordinary circumstances, are comparable sales of value in determining the market value of any given piece of land?

A. Very much so, yes, sir.

Q. Would that have to be comparable, though?

A. In other words, the situation would have to be comparable. That is just what it means.

Q. In your examination of the Tract H-801, have you made an effort to determine whether there were any sales which in your opinion were comparable, in the immediate vicinity?

A. I made the study on two or three occasions.

Q. Have you found any sales which in your opinion were comparable?

A. I could not find any.

Q. What are the reasons why, in your opinion, these other sales in the vicinity are not comparable?

A. What sales are you referring to?

Q. Any sales. A. Any sales?

Q. Yes.

A. Well, there are several reasons. One is, first, location. Next is the size of the land. The fact that they were not as close to the source that I felt needed housing, and that the terrain of the land was such that it [157] was washy, so as comparing for comparable area or land for the subject property, I honestly could not find one. I just couldn't find one.

Q. There is in evidence testimony by an expert

(Testimony of Bert Cavanagh.)

witness that certain sales were considered by him. And I refer you to the southeast corner of Litchfield Road and Glendale Avenue, wherein a sale was made in the year 1953.

Do you have an opinion as to whether that is comparable and of assistance as of evaluating Tract H-801 on March 11, 1957?

A. First, I eliminated it because of the time lapse. I didn't feel that it was current enough to take and have a base on the market value of land in 1957.

Secondly, it was not comparable because of its size, and it was for a different use.

Q. Has anything occurred in recent years which would have any additional effect as to whether it was comparable?

A. No, sir, it was never developed, in my opinion, in any relation or comparable manner in which a subdivider or builder would develop the property in question.

Q. As a matter of fact, there is commerical usage on that piece of land now, is there not?

A. Yes, sir. [158]

* * *

Q. Do you know what the status of Luke Air Force Base is with respect to the program?

A. It is a permanent base, and has been since April, 1956.

Q. Do you have an opinion as to whether that fact alone has any bearing upon the market value as of March 11, 1957, on Tract H-801?

(Testimony of Bert Cavanagh.)

A. Yes, it has a very definite bearing on the value.

Q. What is your opinion of that bearing one way or the other?

A. It gives stability to what might have been a base that could have been withdrawn very easily, and the need for housing would have been eliminated, and the fact that the base was made permanent, it just leaves it to the Government, in other words, to take and provide some adequate housing which was not necessary before.

Q. Do you have an opinion as to whether an investor or subdivider as of March 11, 1957, would be willing to pay for tract H-801 any more money on a per acre average than [159] for farm values?

A. Yes, sir.

Q. Considering your experience in the appraising and real estate field, and all of the matters to which you have testified here today, do you have an opinion as to the market value of the entire Roach-Baker holdings as of March 11, 1957, before the taking? A. Before the taking, yes, sir.

Q. Do you have an opinion? A. Yes, sir.

Q. What is that opinion?

Mr. Eubank: I object to that, your Honor. **There** has been no foundation laid for his answer to that question. Under the Ninth Circuit Honolulu case, I don't think it has been adequately shown that the foundation has been laid.

Mr. LaPrade: I would like to be heard on the point.

The Court: All right.

(Testimony of Bert Cavanagh.)

Mr. LaPrade: The Honolulu case to which he refers singles out that comparable sales are very weighty. In this instance, the evidence is conflicting as to whether the sales are in fact comparable, in which event there would be no necessity for that foundation. [160]

* * *

The Witness: In my opinion, the value of the entire piece as of March 11th, 1957, was \$611,695.

* * *

Q. (By Mr. LaPrade): Mr. Cavanagh, do you have an opinion as to the market value as of March 11, 1957, of [161] the remainder of the Roach-Baker lands after the taking?

A. After the taking?

Q. Yes, sir. A. \$342,415.

* * *

Q. Would you designate the difference.

(Witness writes on board the figure \$269,280.)

* * *

Q. Mr. Cavanagh, in arriving at your opinion of the market value of the Roach-Baker ranch before the taking, please explain how you arrived at that figure, and what values you have attributed to each particular parcel of this ranch? [162]

* * *

(Testimony of Bert Cavanagh.)

A. Of Section 3, yes, sir. I am talking about the southwest quarter, southeast quarter, that is the property that is in question. The southeast quarter of Section 3.

Now, taking the southwest corner of that property, starting at the corner of Dysart and Glendale, and running 1255 feet, which eliminates the road, figuring that at \$100 a foot, which is the commercial zoning, I have a valuation of \$125,500.

Q. How deep is that?

A. That runs 660 feet, or 595 net.

Now, that is equivalent to \$6000 an acre for commercial property.

Q. That would be the frontage on Glendale?

A. Yes, sir. [163]

* * *

A. Then I took the next 1320 feet running from that point west, on the north side of Glendale Avenue for multiple zoning, at \$25 a foot, having a valuation of \$33,000, or \$3300 an acre for multiple-family land. [164]

* * *

A. The balance of area, there was approximately 19.7 acres was removed, already sold to a school, and it left this little area of 100 feet here on the top, and this area here which I figured for zoning for residence, of approximately 110 acres, and I had a valuation of that at \$1500 an acre, which gave \$166,395 for the area devoted to residence.

(Testimony of Bert Cavanagh.)

* * *

A. The balance of the ranch. I figured that we have frontage on Glendale Avenue, on the south side of Glendale. You have frontage on the east side of Dysart. You have some frontage on Northern Avenue, so taking it all in all, figuring that a lot of it was removed from the section lines, I put a valuation of \$900 an acre on the balance of the property, that is, of the entire property.

Q. Then I take it by your testimony that the land which was actually taken by the Government is the most valuable portion of this particular holding of Roach-Baker? A. Yes, sir.

Q. And you would attribute that to the corner in the front?

A. Its location on a double section line corner, the [165] fact it is on the main road where people from Phoenix and Glendale travel, and that it would lend itself to a very fine commercial development also for housing, multiple housing, which in my opinion was very much in need. [166]

* * *

Q. Assuming that the Government's witness is correct, for the purpose of our argument here, that this is only farm land, and has no value for any other purpose, that Luke Field was not there, and that it had no effect on the market value of this land.

(Testimony of Bert Cavanagh.)

Have you considered this matter from that point of view, as to whether there would be any depletion in market value on the remainder land after the taking? A. Yes, I have.

Q. And what are the factors which assist you in arriving at an opinion in that regard?

A. Well, to enumerate some of them: first would be the disruption of your irrigation system.

Q. In what respect?

A. Which would mean that the laterals that were in existence would have to take and be moved, because the property was in the center, in other words, block the progress of the [167] water to the south.

It would mean that you would lose your tail water, which is the water accumulated in the sump in the south, which water was used to irrigate parts of the east land.

You would have to relocate your sump and pump. You would have to take and level for gravity flow the land east of Dysart Road, and there is quite a hump in it.

Then the fact that the buyers would be reluctant to purchase because of the fact here that the Government might need more land adjacent to this, this housing project might go on, and they figure, "will they need more land."

So the fact is a buyer says, "I want to stay out of that picture."

The next thing is the damage suits that could arise by reason of dusting, working it as a field without having the closeness of homes and children,

(Testimony of Bert Cavanagh.)

and other things, that the dusting would certainly be disastrous, I think, and you would have a lot of damage suits.

The next thing, you have the loss of a housing program.

Q. Explain that, sir.

A. In other words, this land, in my opinion its best use was for housing program. If the Government takes this part of the deal, they have taken away the part of the land which would be the best land for housing, so a buyer looking [168] at it would say, "Well, what have I got left? I've got a farm divided into two or three different parcels."

So the next thing is the loss of commercial acceptance. If you have a shopping area that in these days, say, for instance, from 1955 on, you have to provide a lot of parking, and this parking is very essential, so if you have an area which is too small, you can't attract the major chain stores, because they feel that they have to have a lot of parking, and a lot of dollar volume.

Q. Explain specifically with reference to which piece of land are you now referring?

A. I am referring now to the southeast quarter, that is the land from which this property is taken, that is the immediate quarter section.

Q. In other words, the northwest corner of Dysart and Glendale which was zoned commercially?

A. Yes, sir.

Q. Is left with how much commercial now?

(Testimony of Bert Cavanagh.)

A. 300 feet by 300 feet.

Q. Approximately how many acres is that?

A. About 200 acres.

Q. Could that be 600?

A. No. On both sides you have——

Q. I understand. I take it your opinion would be that that is not a sufficient acreage for a successful commercial [169] development on that corner?

A. I am sure it is not.

Q. Do you have an opinion as to whether that is decreased or increased, the value of that corner?

A. If you leave it with that small amount of commercial, then you have certainly depreciated the value of that corner. [170]

* * *

Q. Mr. Cavanagh, when you are called upon to render an opinion as to the market value of a given piece of land, and you do not have what in your opinion would be comparable sales by which to be guided, then how do you arrive at the market value figure?

A. That is a part of your experience that is gained over a period of years, where you have either developed some other property, or have purchased other property, and had developed it, that could be developed with the same [171] method that this particular piece of property could be developed.

Q. And in this particular piece of property, when you refer to subdivision-residential development on the rear acreage, what, in particular, type of residential construction would you have in mind?

(Testimony of Bert Cavanagh.)

A. Residential construction, you mean with regard to size of lots?

Q. Yes, what class, or price?

A. They would be in the medium-price class, running from approximately, oh, from \$9,000 to \$13,000.

Q. And are you able to calculate what that class of residential subdivision would support in the way of investment in land in order to make it profitable?

A. On that type of an operation, if you could buy your land, that is, your residential land as naked land for \$1,500 an acre, it would be very profitable.

Q. Have you considered the value of this land from that point of view? A. Yes, I have.

Q. Referring to subdivision land generally in this Valley, with respect to market values, I now refer you to a scale of values from high to low.

Can you enlighten the Jury as to where this value that you have attributed to this land would fall in that scale? [172]

* * *

Q. Calculating a per acre average price on the land that was taken, have you figured out what this figure of \$268,280 represents on the 132.4 acres which was taken?

A. It is approximately \$2,000 an acre.

Q. And the price of \$2,000 per acre for the use of subdivision purposes, where does it fall in a category, or range in values with other subdivision land in this Valley?

(Testimony of Bert Cavanagh.)

A. That is about what the developers are paying for lands where you have to sell houses from about \$9,000 to \$13,000.

Q. Do you know whether there is any land which is best suited for subdivision purposes, and where there is a market for same for that purpose in this Valley which can be purchased for less than \$2,000 an acre? A. As of that date?

Q. Yes, sir. [173]

A. Not comparably located with the advantages that I spoke about this morning, and with the ready market already developed for you, I don't know of any. [174]

* * *

Cross-Examination

By Mr. Eubank: [175]

* * *

Q. Would you define for me first the term used, "The highest and best use"?

A. The highest and best use is the use to which a property can be put economically, and to show the best return, and also with regard to the type of property, as to whether it should be developed, should be farm land, or should be subdivision land.

It is the best use to which that property can be put at the time.

Q. At the time? A. Yes, sir.

Q. And this would be March 11, 1957?

A. Yes, sir, and it also takes into consideration

(Testimony of Bert Cavanagh.)

the fact that there can be potential growth in the future. [176]

* * *

Q. Now, isn't it true, or do you know of your own knowledge that comparable sales are the best evidences we have of a market, of a going market?

A. Yes, sir.

Q. I understand that it was your opinion that there were no comparable sales in the vicinity of this taking?

A. In the immediate vicinity, and at the time. Time is a big element there, too.

Q. Now, in order for you to come to that conclusion, did you examine sales in the area?

A. Yes, I did. [177]

* * *

Q. My understanding of the main basis of your opinion that this area is residential, multiple housing, I believe, and commercial, is the fact of the soldiers stationed at Luke Field?

A. That is one of the reasons. Soldiers, plus civilians.

Q. And the payroll, you might say, of the Luke Field itself?

A. Yes, sir, that is a very very big influence, yes, sir. [182]

* * *

Q. My understanding, Mr. Cavanagh, is that you did not search further than that immediate area

(Testimony of Bert Cavanagh.)

there because you felt in your own mind that any sales like up in the Adaman Mutual District were not comparable, is that your position?

A. Yes, I definitely say it was not comparable.

Q. Consequently, you would rule out any of those sales, even though they are only a mile from the property? [179]

A. I ruled it out because they are not comparable, in my opinion, that they were not comparable.

Q. They are not comparable in your opinion because of the location of the Luke Air Force Base, is that correct?

A. No, sir. That is only one of the advantages. One of our biggest reasons is because of the fact it is on the opposite side coming from where the population centers are.

Q. From the road?

A. Yes. That is very important. Coming from Phoenix, and coming from Glendale you would have to go by Luke Field to get to the other side of it.

Q. Okay. That is for residential. You will admit that that would only make a difference in the residential development?

A. It would make a difference in the home development.

Q. I mean why the sales are not comparable up in the Adaman Mutual District from this land that we are talking about.

A. Because of the fact that is very important, and the fact that it is on a main arterial road

(Testimony of Bert Cavanagh.)

coming from town, it is closer to Luke Field, and that it would be more natural that you would subdivide that sooner than going farther away from it. The water situation—— [180]

* * *

Q. Now, what type of an investment are you contemplating out there on this \$2,000 acreage, this multiple housing you are referring to?

How many hundred thousand dollars?

A. Pardon?

Q. How many hundred thousand dollars?

A. The shopping center would undoubtedly cost, oh, possibly you would probably start with about an investment in your shopping center of about \$300,000 to \$350,000.

Q. It would be a pretty large shopping center?

A. Not in these days, it isn't. [183]

* * *

Q. You understand we are interested in March 11, 1957, don't you?

A. I say, I am bringing it up. I was interested not only on March 11th, I saw the potential growth from 1943 to 1957.

Q. In other words, the potential of the base at Luke Field?

A. Luke Field, and other people farming, going into the area, new people coming into that area, which is a matter [184] of growth.

* * *

(Testimony of Bert Cavanagh.)

Q. Where is all this demand for subdivisions out in that area? Do you know how far Long's Maryvale is from that [185] area?

A. Yes, he is around 53rd, 55th, 60th.

Q. Almost seven miles?

A. I would say between six and seven miles. Just comparatively, if you want the comparison.

Q. How about Glendale Avenue?

A. Can I ask you about the comparison. He took a new area at the time he went out there that I myself, as an appraiser, I thought was a little premature. He went out there and developed over 5,000 houses, built shopping centers which weren't apparent before he got there. [186]

* * *

Q. Isn't it true that at this moment all of those people that are at Luke Air Force Base, that are living off the base, are actually living in some form of rental in the area right now? [187]

A. What do you call by the area? Six or seven miles away?

Q. In Glendale, Litchfield, sure, six or seven miles away.

A. I say, that is practically the nearest subdivision for either the personnel, or for the force out there.

They really have to travel from Glendale, or to Litchfield, or into Phoenix, a great percentage of them go to Phoenix. [188]

* * *

(Testimony of Bert Cavanagh.)

Q. Okay. Let us get back to Tract H-801.

Your testimony indicates that there is a scarcity of land in that area on which to put houses.

Is there any scarcity of land around there, Bert?

A. I would say scarcity of comparable land, yes, sir.

Q. You are using comparable land, not in the sense of comparable sales?

A. As to location.

In other words, if I was a developer, and I had my choice, I would certainly take that land which is under consideration here rather than the wash land, or waste land, or some farm land farther removed. Just personally, as a developer, that would be more important to me.

Q. Even though it costs you \$2,000 an acre?

A. Yes.

Q. And you might get the other land for half that?

A. And probably have the same results as in the subdivision to the south. The land is not good, and therefore it is not selling. [189]

* * *

Redirect Examination

By Mr. LaPrade:

* * *

Q. Assuming that the Government's theory is the correct theory, that the highest and best use is for farm land purposes only, and we are not con-

(Testimony of Bert Cavanagh.)

cerned with values for any other purposes, and considering the physical lay-out of the [192] remainder of the farm, as it were, would you have an opinion as to the market value of the remainder of the farm as compared to before?

A. After the severance of the property in question?

Q. Yes, sir. Or to pinpoint it on a per-acre average basis, would you have an opinion as to whether there was a decrease in the market value per acre?

A. I think there would be a decrease in valuation of approximately \$400 an acre. [193]

* * *

Q. Have you worked out an opinion as to farm values in connection with this land on a hypothetical basis, assuming it has no other value?

A. Approximately \$700 per acre, under the conditions of having three separate locations, and the reallocation of water, and the damage that you sustained because you cannot crop dust.

Q. By that do you mean to say that the remainder of the land as farm land would have a value of \$700 per acre? A. Yes, sir.

Q. Then you are referring to 356 acres at \$700 an acre? A. Yes, sir.

Q. That is after the taking?

A. That is after the taking.

Q. And what, in your opinion, is the market value of [194] the entire farm?

A. \$1,100 before taking, taking into consideration everything.

(Testimony of Bert Cavanagh.)

Q. As farm land? A. Yes, sir.

Q. 488 acres at \$1,100 an acre?

A. Yes, sir.

Q. Those are your figures multiplied out?

A. Those are my figures.

Q. Would you, Mr. Cavanagh, without specifically multiplying those out at this moment, will you tell the Jury what the factors are which prompt you to conclude that there is a loss in value of \$400 per acre after, as compared to before the taking?

A. I think I gave you this morning the disruption of irrigation. The loss of tail waters. The relocation of sump and pump. The levelling for gravity flowing. [195]

* * *

ROBERT L. BLAKE

called as a witness in behalf of the Defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. LaPrade:

* * *

Q. What is your occupation?

A. Appraiser; valuation engineer.

Q. Where did you receive your education?

A. University of Arizona.

Q. What degree did you receive?

A. Bachelor of Science in Civil Engineering.

Q. When did you graduate? A. 1937.

(Testimony of Robert L. Blake.)

Q. Have you been in the appraising business ever since then? [196]

A. No, I was with the United States Geological Survey for some years.

In the United States Navy for three years. And in the appraisal business since 1945.

Q. Where?

A. Here in Phoenix, Arizona, and all over the state.

* * *

Q. And have you had occasion to appraise real estate which is suitable for either farming or subdivision purposes?

A. Yes, I would say virtually all purposes.

Q. And have you had occasion to specifically appraise and examine lands in large acreage blocks for purposes of future subdivisions? A. Yes.

Q. Have you had occasion to observe whether or not in this Valley at any given point of time, land ceases to be valuable for one purpose, and increases in value for a different purpose? [197]

* * *

Q. Has or not it been a common occurrence in this Valley in recent years for farm land to cease having value as such, and to have an increment for other purposes?

A. Many many acres have been in that category.

Q. Do you know in which direction the general population movement is headed in this city?

A. Generally north, northeast, northwest, east and west.

(Testimony of Robert L. Blake.)

Mostly it eliminates the south, more so than any other direction. The other directions are much more predominant.

The most recent acceleration of move has been to the northwest, the Deer Valley area, and the John Long developments have all indicated that in the next few years development is going to be primarily to the west.

We also have some plans for a direct coast—Phoenix to the Coast highway that will take Van Buren as [198] its general route.

That is not definite as yet, but it has been thought of, and these things are all developing to the west.

Q. How do you go about appraising a given plot or block of acreage as to its highest and best use?

A. Well, in determining, in arriving at a conclusion as to the highest and best use of a piece of property in connection with appraising it, the process amounts to an examination of not only the property in question, but the general area, and also such things as zoning, possible deed restrictions, various things of that nature that would affect what a piece of property can both legally and logically be put to use, for what purpose is there a demand.

You simply have to go out and study the area and determine what possible uses there may be now, or in the immediate future, for this land, and decide on which one will be the highest value to that land.

Therefore, when you decide in your own mind, then you will consider that the highest and best use.

Q. And have you been employed in this case

(Testimony of Robert L. Blake.)

heretofore to render an appraisal, and your opinion of the market value of Tract H-801, in this action?

A. Yes, I have.

Q. And specifically what did you do with respect to arriving at an appraisal of value in this regard? [199]

A. In the case of the Baker-Roach property, I was first employed in 1957. I forget the month. Sometime during the year 1957.

And my first step was to go out and look at the land itself, and also the general area involved.

Of course, I am familiar with it in a general way, without any specific inspection.

I have been here practically all my life, and I have known that area for many many years, but in connection with this specific appraisal, there was an on-the-spot complete and thorough investigation made of the entire area in and about Glendale Avenue and Dysart Road, including to the south, north, the Luke Field area, and east to the Glendale area.

The next step after the thorough physical inspection is an inspection of the records to try and determine if there are sales in this area, which by point of time, and type, and size might be comparable to this land.

Q. Did you make that inspection?

A. Yes, I did. I made an exhaustive study.

Q. And what did you find?

A. I found no sales in this area of anything that I considered comparable. [200]

(Testimony of Robert L. Blake.)

This location, it is obvious, is on the main route of travel to Luke Field. It is near it. It is handy. Yet it is far enough away that it is away from the principal noise nuisance of Luke Field.

It fronts Glendale Road, Glendale Avenue, which is, as I say, the obvious main access road to Luke Field. It also fronts on Dysart Road. In other words, it is at a mile corner.

It is on the side of Luke Field toward development, rather than away from it. The terrain is, well, it is cultivated. It is level, good, for the most part good, level land. It is in cultivation.

All of these things would have to apply to any other land in order for it to be comparable.

Now, the only possible ones, I don't think there is much question about it, would be maybe these four corners right here (indicating).

Q. Where is that, sir?

A. The southwest corner of Dysart Road and Glendale Avenue. The southeast corner of Dysart Road and Glendale [201] Avenue, and the northeast corner of Dysart Road and Glendale Avenue.

Q. What is the topography of this southeast corner of Dysart Road and Glendale?

A. I wasn't quite through, Mr. LaPrade.

Q. Pardon me.

A. These are the only possible comparable pieces of land.

None of them, however, is completely cultivated. None of them is as level right to start with. So on that basis alone, they are not entirely comparable.

(Testimony of Robert L. Blake.)

In addition to that, none of those have sold. So the study of sales in the area turned up quite a few, but none of them were any good.

They were different kind of land, located in a different relative position, a different type of terrain, not cultivated, various things. Something made every one of them, every piece of land that I found in the possibly 10-mile radius—I don't think I went that far, say, 10 miles diameter, 5-mile radius—every one of them had some element that would not measure up to this land. [202]

* * *

They were all different kind of land. There were some sales during that period, but they were all different kinds of land.

Q. With respect to the subdivision south of Glendale Avenue on the east side of Litchfield Road circled in red on the left center of Government's Exhibit 1 in evidence, did you have an opportunity to examine that situation, Mr. Blake?

A. Mr. LaPrade, if I may say, I don't believe I finished answering your last question.

You asked me what I did, and I wasn't through with what I did. I don't want to get confused here.

Q. I will strike my question, and you proceed.

A. That wasn't all I did was just arrive at this point of investigating the sales.

After that, I then investigated the possibility of finding sales of similar lands for a similar purpose, in a slightly different area.

(Testimony of Robert L. Blake.)

In other words, this piece of land I consider in a strategically located spot, in an area where housing is needed, as evidenced by my investigations as to the number of personnel living off the base, the locations where I actually found them living being so remote from their place of occupation, I felt that there was a very definite need for housing in this area, and feel that this is the best [203] place to put it.

Now, then, this resolves itself to this set of circumstances.

We have a piece of land fringing an area that needs development. I therefore considered that if I could find some lands in the same situation market-wise that were fringing another area that is already developed, and in demand for development, where housing is needed, if I could find lands like that, even though they weren't in the immediate vicinity, then that would give me an indication of what this land would bring in the market.

On the other hand, just outside Luke Air Force Base, what would a developer be willing to pay for land—I think it is indicated by the testimony that some land may be six or seven miles away, what it might have sold for in the market to a developer with a market at hand.

He is in the fringe of development, and it is growing, his land is in demand, so on that basis I think that comparable lands are not in this immediate vicinity, but are on the fringe of growth.

I therefore studied some of these areas and found

(Testimony of Robert L. Blake.)

an indication of values of lands ready for development, that I used in basing my opinion of this land. [204]

* * *

Q. Do you have an opinion of the highest and best use to which Tract H-801 could have been put on March 11, 1957? A. Yes, I do.

Q. And what is that opinion?

A. In my opinion, the land could best be used as a residential development for the acreage back of the main streets.

And commercial development on the corner of Dysart—the northwest corner of Dysart Road and Glendale Avenue, and a combination professional multiple-dwelling development along the Glendale Road frontage, what is commonly referred to as R-5 property.

Q. That is a reference to zoning?

A. That is a zoning reference which indicates it can be used for professional offices, or multiple dwellings.

Q. In making an appraisal as to what a willing buyer would pay a willing seller, do you have an opinion as to whether the present zoning of a part, or all of the property in question, would be a factor that a buyer would consider?

A. Yes, it would be. [205]

* * *

Q. Do you have an opinion as to whether the

(Testimony of Robert L. Blake.)

demand for housing in the immediate vicinity of Tract H-801 was sufficient on March 11, 1957, to have an effect on the actual market value of the land? A. Yes, I do have an opinion.

Q. What is that opinion?

A. In my opinion, as revealed by my studies in connection with this appraisal, I feel that the demand, the indicated demand for housing in this area would warrant an immediate development of this quarter section of land.

Q. And you were, of course, aware of the Government's Wherry Housing and Capehart Housing projects that under the law the Government can resort to if they need it? A. Yes, sir.

Q. Generally speaking, I mean you are familiar with that type of projects?

A. Yes, sir, I am.

Q. And do you have an opinion as to whether that type of project would be needed if it was first developed by the land owners?

A. I do not think so. I think it is obvious the only reason any development would go in there was because it was needed, and if private capital has not done it, then these [206] various methods have been provided by law to take care of housing.

Q. And do you know when Luke Field became a permanent facility?

A. I believe in April of 1956.

Q. That was approximately a year before this action was filed by the Government? A. Yes.

Q. And do you know whether it became generally

(Testimony of Robert L. Blake.)

known about the time the Government made the air base a permanent facility, that this project would be the next step?

A. As I recall, it was general knowledge very shortly thereafter.

Q. So considering your experience and your background in all of the matters to which you have testified today, Mr. Blake, do you have an opinion of the market value of the Roach-Baker ranch, that is, all of their holdings, on March 11, 1957?

A. Yes, I do.

Q. What is that opinion? Will you write it on the blackboard, sir? A. \$724,300.

Q. \$724,300. Do you have an opinion of the value, in terms of fair market value, of the remainder of the ranch after the taking? [207]

A. Yes, I do.

Q. What is that, sir? A. \$492,000.

* * *

Q. What is the difference in those two figures?

A. \$232,300. [208]

* * *

A. That represents for the 132.4 acres taken \$1,750 per acre.

Each of the above two figures are predicated upon various amounts for the various portions of this land which I don't consider all the same.

I don't think that all that land is exactly the same.

(Testimony of Robert L. Blake.)

Q. In arriving at your "after" value, to wit, 492,000, have you made a deduction for any severance damages? A. No, sir. I have not.

I think that the highest and best use of this land remains the same before and after this taking, and this does not involve farming.

I think that all of this land has a value that can be predicated on a higher usage than farming. And those potentials, and those elements of value remain there [209] regardless of who develops this 160 acres, the fringe land around it remains the same. It is still next to a development, and there is no difference when considering the highest and best use.

* * *

Q. Assuming for the purpose of argument that this farm is a farm, and was on the date of taking, and had no value for any purpose other than farming, and omitting any other increment or element of value from this problem, would you have an opinion as to whether the remaining land after the taking would have a per acre market value, market valuation, the same as before the taking?

A. Yes, I have such an opinion.

Q. What is that opinion?

A. In my opinion, the remaining acreage would not have as high a unit value as farm land after this taking, for the purpose intended.

Q. Why is that? [210]

A. Actually, the primary reason is the undoubted

(Testimony of Robert L. Blake.)

elimination of the most economical method of crop dusting, which is by airplanes.

It simply would not be feasible. I don't think anyone would even want to go in there with airplanes flying low, and poison dust, and so forth, even if the law allowed it.

I don't believe they would want to go in and dust by that method any more when they are right next to a school and a housing project.

Q. Then it is your opinion that a prospective purchaser would weigh that matter heavily?

A. Yes, I think that the only remaining value then goes to a bargain purchase.

* * *

Mr. Eubank: May the record show that the Government has moved the Court for a Jury view of the condemned real property and the property surrounding the taking, and that counsel for the Defendant had no objection, and that the Court granted the motion for one o'clock tomorrow afternoon. [211]

* * *

Cross-Examination

By Mr. Eubank: [213]

* * *

Q. Now, you stated that there were no, in your opinion, no comparable sales in the vicinity of the condemned property?

A. Yes.

(Testimony of Robert L. Blake.)

Q. And I assume by that that you did not feel that the sales up in the Adaman Mutual, or in the Adaman Water District were comparable?

A. I consider them comparable in no way at all. [214]

* * *

Q. So when we in appraisal work, or in appraising talk of comparable sales, we are talking in effect of guides, isn't that correct, guides to market?

A. That is certainly true. However——

Q. That's all I asked you.

A. This needs some explanation, if I may.

Q. Well, Mr. LaPrade can ask you.

A. This is not a complete answer.

Mr. LaPrade: I would like to have him explain it, your Honor.

The Court: Go ahead.

The Witness: The fact that your properties are not exactly comparable is probably true in most cases. However, using the comparable sales method does not intend to use a resolving of differences method.

You must guard against resolving differences, rather than drawing comparisons. You must draw comparisons and not resolve differences.

That is a basic concept of the comparable sales approach, and you must always guard against that resolving [215] of differences, rather than drawing a comparison.

Q. (By Mr. Eubank): So in your opinion that

(Testimony of Robert L. Blake.)

is what you would have been doing if you had taken into consideration any of the Adaman transactions or sales behind Luke Field, over to the west?

A. Yes.

Q. And also, I suppose, any sales closer in to Glendale? A. Not necessarily.

Q. My understanding is that you did consider land that you call similar land, the sale of similar lands in a similarly affected area?

A. Much more closely comparable.

Q. As far away as six or seven miles away?

A. Correct.

Q. Now, I take it that you agree with Mr. Cavanagh as to the market for the multiple housing and commercial properties or valuations that you have given these lands, in that that lies on the Luke Air Force Base, is that correct? A. Yes.

Q. That is one of the large factors, evidently, in your mind, that makes this area in your opinion a residential and commercial area?

A. The fact of Luke Field being there?

Q. Yes. [216]

* * *

Redirect Examination

By Mr. LaPrade:

* * *

Q. (By Mr. LaPrade): Mr. Blake, on cross-examination you referred to the term of "resolving of differences," rather than making comparisons.

(Testimony of Robert L. Blake.)

Will you elaborate on that and explain precisely what you mean by those phrases to the Jury?

A. Well, I think that they are pretty much self-explanatory.

It is, as I say, a basic concept, and is [217] spelled out very carefully in any appraisal work, that the comparable sales approach is, if applicable, the best approach that can be made. But that the appraiser must always guard against going out and finding a piece of property that is not truly comparable, and then in his own mind saying, perhaps, well, this isn't the same, but this one is probably twice as good, and then doubling that value in arriving at it. This is not the way to use the comparable sales approach.

You must find lands that in virtually every test, in nearly every measure is comparable.

Now, one or two things are going to be a little different, or somewhat different in every case, but you must draw a close comparison, and not view something that is entirely or completely different, and resolve those differences. This is not the method at all.

Q. Then I take it in examining other sales in the vicinity of Tract H-801, it was your opinion that to call them comparable, you would have had to resolve differences, rather than make comparisons? A. Yes, sir.

Q. And that was your main reason for rejecting them as comparable sales? A. Yes, sir. [218]

(Testimony of Robert L. Blake.)

Recross-Examination

By Mr. Eubank:

Q. Just one question. It is my understanding, then, you did not use the comparable sales approach to valuation?

A. Yes, I did. I think I stated that I did.

Q. You said you used the similar sales, sales of similar land in similar area approach?

A. This is what I call closely comparable.

Q. That would be your definition of comparable sales approach? A. That is right.

Q. Even though the property is six or seven miles away?

A. That is the one difference. The other factors are all quite similar, and I think these are similar enough to use these lands as a guide. [219]

* * *

HERBERT V. ATHA

called as a witness in behalf of the Defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. LaPrade:

Q. Will you state your name, please, sir?

A. Herbert V. Atha.

Q. Where do you live, Mr. Atha?

A. Litchfield Park, Arizona.

Q. By whom are you employed?

(Testimony of Herbert V. Atha.)

A. J. G. Boswell Company.

Q. What is the business of J. G. Boswell Company?

A. Oh, we farm, and we loan money on crops, and we gin cotton. We have oil mills, and we feed cattle.

Q. Where are the J. G. Boswell operations located in this county?

A. We have got about ten gins. I will have to count them up.

Q. Where are they generally located? Not the gins, sir, but the farming operations?

A. The farming operations are at Marinette Ranch, which we own, northwest of Peoria, and another ranch called the Santa Fe Ranch. [220]

Q. What is the total acreage of the J. G. Boswell operations? A. About 16,000.

Q. What is your purpose with the company?

A. I am the manager.

Q. You are the general manager of J. G. Boswell Company? A. For Arizona.

Q. And for how long have you been employed by them? A. About 32 years.

Q. What are the different positions you have had?

A. I started in charge of the gins and oil mills. Then I got in the farming. Then I got in the money loans. Then I finally tumbled into being manager.

Q. Does the J. G. Boswell Company engage in farm loans for farmers? A. Yes.

Q. Is that for the purpose of growing crops?

(Testimony of Herbert V. Atha.)

A. Growing crops, and we make capital loans to help people buy farms.

Q. In that regard, do you secure your loans by mortgages?

A. Yes, we usually take a second mortgage.

Q. In connection with the cotton ginning operations of your firm, are you associated with farmers generally in the valley? A. Yes. [221]

Q. And in fact you gin their cotton?

A. That is right.

Q. And you loan them the money to grow their crops with? A. That is right.

Q. That is, as a matter of fact, the general method of financing farming operations in this day and age, is it not? A. That is right.

Q. Particularly with respect to cotton farming?

A. That is right.

Q. Are you engaged in farming personally?

A. Well, I have a place, but I have to rent it out. You can't farm for yourself and work for the Boswell Company.

Q. Where is your farm located?

A. My southwest corner is about a half a mile from Baker and Roach's northeast corner.

Q. Referring to Government's Exhibit 1 in evidence, this aerial photograph, then your property would be north and east of their property?

A. Yes. (Indicating on map.)

Q. Would you please speak louder?

A. I say, I am almost in the river, probably right

(Testimony of Herbert V. Atha.)

up. That's it. I am just a half-mile from this corner on Northern Avenue.

Q. You are half a mile north of Northern [222] Avenue?

A. No, I am on Northern Avenue. My south line is Northern Avenue, and I am half a mile east.

* * *

Q. (By Mr. LaPrade): Would you make a circle there, and on up to where the figure 202 is on the map?

* * *

Q. How long have you had that piece of property?

A. I can't remember. I have had it for about 15 years.

Q. Are you familiar with the Roach-Baker property? A. Yes, I am.

Q. Have you been on that land?

A. Oh, my, yes.

Q. How long have you been acquainted with that property? [223]

A. Well, long before they had it. I guess I have gone by it maybe three times a week for the last 15, 16 years, because I go that way to Marinette.

Q. In your experience with the Boswell Company, have you had occasion to analyze farms with respect to their general layout, and their productivity, and the ins and outs of the farming business?

A. Yes.

Q. Tell us what you must consider in deter-

(Testimony of Herbert V. Atha.)

mining whether to loan money for the purpose of a farmer purchasing another farm.

A. The first thing we consider when we make loans is how we are going to get the money back, so the main point on that is how much money will the farm make as a farm.

Q. You don't know anything about the subdivision business, do you? A. No, not a thing.

Q. Mr. Atha, assuming for the purpose of argument, that the Roach-Baker properties have no value for any purpose other than farming, as contended here by the Government, and make that assumption with respect to my following series of questions, if you will:

Do you know how many acres of land were planted in cotton in the year 1955?

A. I have got it in here. I just asked the girl in the [224] office to give me their production.

Q. Backing up a little bit, Mr. Atha, by way of explanation, do the Roach-Baker farm, or do they gin their cotton with you?

A. Yes, they gin with us.

Q. I assume, then, that your company has a means of keeping records with respect to how much cotton you gin for them? A. Yes.

Q. And eventually you put it into bales?

A. Into bales.

Q. And have you made inquiry, or made yourself familiar with their cotton production in the past three crop years? A. Yes.

Q. Let us start with the year 1955.

(Testimony of Herbert V. Atha.)

A. 1955-1956, they got 279 bales off of 90 acres.

Q. State that once more.

A. 279 bales off of 90 acres.

Q. And in 1956?

A. 1956-57 they got 332 off of a hundred acres.

Q. The next year?

A. 1957-1958, 312 off 100 acres.

Q. And those are the figures which your company has in its records? [225] A. Yes.

Q. Are you familiar with the nature of the fertility of the soil on the Roach-Baker farm?

A. Yes.

Q. And what is that situation?

A. I would say the farm is always one of the best farms out there, the most productive in the way we look at it.

We appraise for what a farm will make, how much money it will make.

Q. And has this been a productive farm?

A. This has been a very productive farm.

Q. Generally speaking, by the figures you have given, it would indicate an average yield of three bales per acre, would it not?

A. Yes. It is a little over.

Q. How does that rate generally with farming?

A. That rates way up, within the top four or five or six.

Q. Are you familiar with the water conditions on the Roach-Baker farm?

A. Yes, quite familiar.

Q. Have you been on it and looked at it?

(Testimony of Herbert V. Atha.)

A. Yes.

Q. Do you know how they irrigate it? [226]

A. Yes.

Q. Are you familiar with the sump, and the manner in which they use it?

* * *

Q. * * * With regard to the water supply on this property, and considering your knowledge of the farming practices on that farm, and the crops which they have put in over the [227] years, do you have an opinion as to whether there has been sufficient water? A. Yes.

Q. For the purposes?

A. Yes. In my opinion there has been plenty of water.

If there hadn't been, they have got one well out there, I think 900 feet deep—my figures are approximate—lifting water from about 250 feet, and the wells in that general locality run about 30 to 50 gallons per foot of drawdown, so if they wanted another 100 inches of water, if it was 50 gallons per foot, why, another 20 feet would give you another 100 gallons of water, or another 1000 gallons of water, as a matter of fact.

Q. Do you know approximately how much of the acreage on the east side of Dysart Road as of March 1957, they were irrigating from the tail water from the sump?

A. Not accurately. I think they were irrigating about a hundred acres.

(Testimony of Herbert V. Atha.)

Q. If it was the testimony of Mr. Baker that it was 80 acres, you would accept it?

A. I would accept it. I certainly would. [228]

* * *

Q. Are you familiar with the manner in which they have to irrigate the remainder of the ranch, subsequent to the Government's taking Tract H-801?

A. They have got to get this water over [229] here.

* * *

Q. Now, explain to the Jury the result of the taking of the land, with respect to the tail water situation.

A. In other words, the two sections will take care of about a half section, and it costs about 50 cents an acre-foot to pump up sump water.

It probably costs at least 5, 6 dollars to pump it. If they were using 5 and 6 dollar water on this, and catching this tail water and getting water for 50 cents to irrigate this spot here, and now they only get half the tail water, so they have to use more 5 dollar water than they have before——

Q. The result being that their water is costing more per acre than it did before?

A. It is costing more per acre than it did before.

Q. At present, then, they would be pumping direct from their pumps down into the sump? [230]

(Testimony of Herbert V. Atha.)

A. Direct from the pumps into the sump.

Q. Do you know whether there is sufficient tail water now going into the sump to irrigate the 80 acres on the east side of Dysart?

A. Yes, I am sure there is.

Q. All tail water?

A. I am sure it is all tail water. That should handle the whole 80 acres.

Q. The Government has taken the southeast quarter of that section? A. Yes.

Q. And that much less land is irrigated?

A. Yes.

Q. So they have that much less tail water?

A. Yes.

Q. Have you familiarized yourself as to whether now there is sufficient tail water to irrigate the east 80?

A. No, there would only be half enough. If there was enough with the 320, and they got another 60, there's going to be only half enough tail water. [231]

* * *

Q. To irrigate the entire 120 from north to south, they would have to do considerable leveling?

A. They would have to knock the hump off, or come around it some way. Water won't run over a hill.

Q. That costs money?

A. That costs money.

(Testimony of Herbert V. Atha.)

Q. How much money does it cost to level land?

A. There is such a wide variety. Land that will irrigate in furrows, a lot of it, and it looks pretty good, you can spend a hundred dollars right off levelling for vegetables.

Q. Mr. Atha, considering your experience in the farm-loan business, and as a farmer, and as a neighbor of the Roach-Baker land, personally, do you have an opinion as to the market value as of March 11, 1957, of the entire Roach-Baker land?

A. I would say it would pay off \$900 an acre, they could get \$900 an acre for it, in relation to other lands.

Q. That is predicated your values on use as a farm only?

A. As a farm only, and what that land will produce.

Q. Assuming there were 480 net acres. It would be 480 times the \$900, is that your testimony?

A. Yes. [232]

* * *

Q. Mr. Atha, do you have an opinion of the market value of the remainder of the farm after the taking?

A. I would say the market value would be probably about \$600.

Personally, I would have to have a bargain price to buy it. [233]

Q. Why is that? Explain to the Jury your

(Testimony of Herbert V. Atha.)

reasons why you have deducted \$300 an acre on the balance of the farm, as a farm?

A. Principally on the dusting.

Q. Explain that, sir.

A. Well, you can't raise your money crops without airplane dusting. You can raise a crop, but you can't raise a good crop, such as cotton and vegetables.

You can dust cotton until it gets to a certain height with a ground duster. But in July and August when you need the dust, you've got to use an airplane, and the dust you are getting now, they are just getting so poisonous that I really think we are all more afraid of them than we will admit.

If they are handled carefully, they are perfectly all right. If a man dusts with parathion, he doesn't want to let anyone go in the field for about 48 hours, and I have friends that dust with parathion and go in in 10 or 12 hours. And with others you are getting the same thing, and every year they are getting more poisonous, and a fellow would be absolutely afraid to dust with those poisons which are the ones you use, with a housing development right next to you.

We surround Youngtown. We have that trouble. We are on three sides of them on our Marinette [234] Ranch.

Q. Where is Youngtown?

A. It is right off of Grand Avenue.

Q. How far out?

A. About 17 miles out.

Q. North and west of Luke Field.

(Testimony of Herbert V. Atha.)

A. It is north and east of Luke Field.

Q. How far from Luke Field?

A. About five or six miles.

Q. Is that a residential subdivision?

A. Yes. It is a big subdivision. They have about 160 acres.

Q. Right out in the middle of the sticks?

A. No, it is not out in the middle of the sticks. It is a nice place. They are doing a wonderful job.

Q. That is where your Marinette Ranch is?

A. Yes, we have it blocked off on three sides, and we are very careful with the dust there.

In fact, we don't have much cotton near that subdivision. We have a little on the north side of it this year, and we don't dust with airplanes there at all, just on the likelihood that something could happen.

Q. What other reasons do you have for knocking off \$300 an acre on the remainder of the land after taking?

A. The water situation isn't nearly as good.

Q. In what respect? [235]

A. You have got to work your water all around. You don't have your waste water to use, which runs into quite a little money.

Moving the machinery of the farm on the odd pieces of land that are separated, while it doesn't look like much, in actual operation it amounts to quite a lot of money.

Q. Will you refer to Defendants' Exhibit E in evidence, and point out to the Jury precisely what you mean by the moving of equipment around.

(Testimony of Herbert V. Atha.)

A. Well, they used to come down here. It was their farm land, and they could farm this, and get over here.

Now this is all going to be subdivision. When you move your machinery, you have to move it down this way, and down that way. You can't get your crops in rotation, so that your working tools come right along down with your water.

We had one customer that had a place where he had to move about half a mile, and he had to give it up. He said he was tired moving his trucks around.

Q. Mr. Atha, in your opinion, is the remaining farm land, assuming this is just a farm, before and after taking, a compact economical farming operation? A. No, I wouldn't say it was.

Q. Would that have an effect on its after market value? [236]

A. I think the effect would be, with the water that you have on that piece below the road, unless they gave you a vested right in the well, which I shouldn't think anybody would do in this country, short of water, there would be no sale for that. It is because without water it is no good, except it would be good for a subdivision, or something like that.

The piece on the east side would be a lot easier to sell in conjunction with the land that was left than the piece across the road.

Q. In multiplying out your figures in the testimony on values, I assume it is your testimony that

(Testimony of Herbert V. Atha.)

the 480 acres before the taking at \$900 an acre would be \$432,000, if my figures are accurate, and after, 600 times approximately 356 acres, would be \$213,600? Is that your opinion of the after value, sir? A. Yes.

Q. And the difference being the representative value of the land that was taken by the Government?

A. That is right.

Q. Which would be a figure of \$218,400?

A. That would be about it. [237]

* * *

Q. * * * The remainder of the ranch after the Government's taking you have testified has a value of an average of 300 per acre less.

A. Less, yes.

Q. And that, sir, we refer to as severance damages, incidentally? A. Yes.

Q. And in that you have considered the crop dusting problem and the water problem?

Now, with respect to the market for the property, if there was a market for it, do you have an opinion as [238] to whether it would be marketable as a farm in its resulting condition?

A. Yes, it would be, that is where I say I think you could sell it for \$600 an acre, as a farm, the land that is left.

Q. Have you had an opportunity to examine other farms, other farm lands in the area with respect to their sales value?

A. From time to time.

(Testimony of Herbert V. Atha.)

Q. Are you generally familiar with the market value of farms out in that area?

A. Mostly by hearsay. I would say I generally am.

Q. It is your business to be informed in that regard, isn't it? A. It is.

Q. And the farmers advise with the lending agencies, because when they go to sell or buy, they need your assistance? Is that how you familiarize yourself with that?

A. They usually have their price, and they come in and ask for money. Then we see what we think about it. [239]

* * *

ARTHUR E. BAKER

being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. LaPrade: [248]

* * *

Q. You may be seated, sir. How much acreage in the east plat of ground, on the east side of Dysert did you formerly irrigate with the use of tail water? [250]

* * *

A. There was 116 acres east of Dysert Road, and we irrigated approximately 80 acres. [251]

(Testimony of Arthur E. Baker.)

* * *

Q. Mr. Baker, subsequent to the Government's taking Tract H-801, you had been farming this land? A. Yes.

Q. What has been your experience with respect to the availability of tail water for use on the 80 acres on the east side of Dysert Road? [252]

A. The amount?

Q. Yes, sir.

A. Well, at all times we have had enough water through this point, strictly from the use of tail water. These four fields here are in alfalfa.

Q. Do you have the same amount of tail water now that you had before? A. No.

Q. How has that affected your farming operation?

A. We have about enough tail water to water from here south, approximately 40 acres.

Q. As compared to what you had before of 80 acres?

A. Up to here, we watered all of this. Now, this past summer we watered this. Of course, we watered it all.

Q. How have you made up for the loss of tail water?

A. These two pumps here now come down this concrete ditch here, and the Government replaced the center ditch with this one here that shows here. It doesn't show much of a ditch here, but it is a large ditch. The water flows down here and comes to

(Testimony of Arthur E. Baker.)

here and reaches this point and comes out to our sump.

Q. In other words, you are pumping water direct to the sump? A. Yes.

Q. And pumping it out of the sump and using it on [253] approximately 40 acres on the east side of Dysert Road?

A. When we pump, we water the whole 80 acres; but unless we pump, we only have enough available ditch water for this piece here.

Q. Does it cost you more or less now per acre foot of water to irrigate your fields?

A. The cost of water is determined by your electricity bill and your maintenance on your pump and your initial investment of your pump and well; and we figure that loss in the neighborhood of 6 or \$7 an acre foot to pump an acre foot of water. This water that goes into this sump by gravity flow costs approximately fifty cents an acre foot to pump it back out because of the lift involved.

Q. Then do you have as economic an operation now as you had before the taking? A. No.

Q. Have you ever had occasion to do anything with respect to your land, the zoning of it?

A. Yes, we had two corners of it zoned.

Q. When did you do that?

A. That was in March—I don't recall the exact date, but March, 1956.

Q. What was the occasion for your rezoning those corners?

A. Well, of course, there is always rumors con-

(Testimony of Arthur E. Baker.)

cerning [254] an air base; and there was rumors concerning this, that it would become a permanent base. I myself had spent a few years in the Air Force and at numerous bases I had been based at there was activity around these bases; and, naturally, I assumed that if this became a permanent base, there would be increased activity around it; and we decided to zone it.

Q. For what purpose?

A. For commercial zoning, mostly, to start with. These two corners, we thought we would have to start them before we could go very far with the rest of it; and we thought either possibly bowling alleys or drugstores or filling stations. We had been contacted by a couple of grocery operators wanting either to lease it outright, or for us to build and they would lease the building. [255]

* * *

Q. Well, strike the question, please. Mr. Baker, would you explain to the jury the difference, if any there is, between the manner in which you must conduct your operation now after the taking as compared to the manner in which you conducted your operation before the taking?

Mr. Eubank: I object to that, your Honor. The loss to the individual is not—any personal loss is not an element of market value.

The Court: No, that has to do with how they operate the land. You may answer.

The Witness: Well, you can see that by taking

(Testimony of Arthur E. Baker.)

this part of it away, we had a graveled road about the size of this ditch all the way up and down this mile.

Q. (By Mr. LaPrade): That is in the center of the east half of Section 3?

A. That is correct. Working these fields, we could [256] cross from here and get into these two fields. Now, because of the change we can't get through here any more; so we have to come over here and come down back of the road a mile, and back a quarter of a mile on Glendale Avenue where you are risking life and limb with a piece of equipment. It is very difficult to farm this piece below the road here. We have also an investment in machinery that is qualified to take care of that much property.

Mr. Eubank: I object to that, your Honor; that obviously is personal loss and not relevant.

The Court: You cannot operate a farm without machinery, can you?

Mr. Eubank: That's right, but he can rent machinery.

Q. (By Mr. LaPrade): Go ahead, Mr. Baker.

A. To pay for machinery you have to operate it. You have to keep it rolling. You have to have land, real estate, to operate it on; and we were in the vegetable business on this place as well as cotton, cattle, alfalfa and grain.

Q. Is this land suitable for vegetable farming as well?

(Testimony of Arthur E. Baker.)

A. In 1942 they raised vegetables on it until we bought it, so I assume it is fit for vegetables.

Q. You have not yourself farmed it in vegetables?

A. Yes, we have raised potatoes and lettuce, and we do have a vineyard on 40 acres of it.

Q. Where did you plant your cotton before the taking? [257]

* * *

Q. Mr. Hanson testified for the Government that in his opinion you do and did not have sufficient water on this farm to conduct a two-crop operation. Can you tell the jury whether or not you have had sufficient water with which to farm this farm?

A. Well, I don't know where Mr. Hanson got his information. He certainly didn't get it from me, and he certainly [258] didn't get it from the Hanson Pump and Machine Company, but he expected the jury to believe that he did.

Mr. Eubank: Now, your Honor, I think that is completely improper.

The Court: No, you just tell what you know about it.

Mr. Eubank: It is certainly not responsive.

The Witness: There is plenty of water for a double crop, and we have double-cropped it ever since we had it.

Q. (By Mr. LaPrade): Have you ever been short of water? A. No.

Q. Are the wells in such condition that you can extract more water from them now if you need it?

(Testimony of Arthur E. Baker.)

A. Certainly.

Q. By doing what?

A. We have a well that was drilled there in 1956. It was contracted for in the summer of 1956. It is 900 feet deep with a 20-inch casing in it; and we left our old pump and motor on it because it was sufficient water for what we needed, especially for this after the land was taken; and at any time we need more water, according to the Hanson Pump Company, it is there, 2,800 gallons from this one well alone.

Q. Mr. Baker, as the owner, or co-owner of this property and defendant in this case, and considering your experience as a farmer and as a man who lives out there for years adjacent to these fields, do you have an opinion as to [259] what the highest and best use to which you could have devoted Tract H-801 as of March 11, 1957?

A. Well, in view of the fact that the base became permanent, I think that subdivision and commercial property along Glendale Avenue would certainly be the highest and best use of it. Possibly farm land on the balance of it until time warrants a change. I might add, if it is permissible, that this—you have asked the disadvantages of losing this; and we have to keep this machinery busy that we spoke of, and we had to go west of us to lease more land for our vegetable operation, which we are now doing and have been doing since this deal started.

Q. Mr. Baker, do you have an opinion as to the

(Testimony of Arthur E. Baker.)

market value of your farm as of the date the Government took this one piece?

A. Yes, I have an opinion. Of course, it may be a little bit biased; but I have it. I think that the property along Glendale Avenue, this 132.4 acres that they took, we will take that 32.4 acres, naturally, right along Glendale Avenue; and I feel that it is worth \$3,500 an acre. The balance of that, which is 100 acres which will have to lie behind it to this line here, is worth \$1,800 an acre.

Q. Have you totaled that up?

A. Yes. The 32.4 comes to \$113,400; and the 100 acres at \$1,800 comes to \$180,000. [260]

Q. What is the total figure? A. \$293,400.

Q. That would be your opinion of the market value of Tract H-801 which the Government has taken? A. Yes.

Q. Mr. Baker, assuming that the experts who have testified for the defense and yourself are incorrect, for the purpose of argument, and saying that this land had no value for any purpose other than as farm land, and omit Luke Field as a factor, do you have an opinion as to whether or not your remainder land will have suffered any damage in the market, that is, by virtue of the Government taking H-801? A. Naturally.

Q. Upon what do you base that statement?

A. Well, a number of reasons. First, the resale value of it has been pretty well butchered up by cutting the property into different parcels as it is. There is more difficulty there in farming it, moving

(Testimony of Arthur E. Baker.)

machinery; and your water situation is a little bit different, a little bit more difficult to control. The care of the crops that we can continue to farm on the remaining parcel, your production will naturally be very limited there because of the fact that it would be impossible to dust cotton after the middle of June by anything except an airplane.

Q. That is because of the rate of growth of the cotton [261] crop?

A. Yes. You can dust it with a ground machine until it gets too big, and you can't get into it. I guess it will be objected to, but Mr. Hanson said it could be done.

Mr. Eubank: I object to your reference to Mr. Hanson, sir.

Q. (By Mr. LaPrade): Just answer my question, Mr. Baker. Continue on that line of reason.

A. Well, cotton cannot be dusted if it gets to any size, with a ground machine unless you skip-row. We don't believe in that. We have sufficient water without it, and our production is high enough that we don't have to skip-row. This, it appears, could be done with a ground machine; but when your ground is wet, after it is irrigated, it is a little rough to get in there with a ground machine; so you put it on with an airplane.

(Testimony of Arthur E. Baker.)

Cross-Examination

By Mr. Eubank: [262]

* * *

Q. No, that is fine. What type of dust do you use on your cotton crop?

A. Well, numerous types.

Q. Well, what is the one that you used before March 11, 1957?

A. You mean the season before?

Q. Yes.

A. Well, we used toxaphene, DDT, parathion, malathion, dieldrin and benzahexachloride.

Q. You use all of those? [269]

A. They are all available, and I would say during the season we probably used at least three of those.

Q. That is the question I asked you, what did you use?

A. We used parathion, malathion and dieldrin. [270]

* * *

VERN A. ENGLEHORN

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Eubank:

Q. Your name is Vern A. Englehorn?

A. That's right.

(Testimony of Vern A. Englehorn.)

Q. You are a partner in the Western Farm Management Company here in Phoenix, Arizona?

A. Yes.

Q. What is the business of the Western Farm Management Company?

A. Western Farm Management Company manages farms and ranches throughout this area for absentee owners and investors, and they make appraisals on farms and ranches and also city property. The demand for appraisals has been such that we cover pretty much the Rocky Mountain west and also California. We are the loan correspondents for two large life insurance companies making farm and ranch loans. Those companies are Northwestern Mutual Life Insurance Company and Connecticut General Life Insurance Company, located in Hartford, Connecticut. We also do a certain amount of what we call farm or ranch management and planning in which we set up the program for the owner, and the owner uses it as a guide in his operation. We do that work for private people, and we also have done [276] considerable management planning on some of the Indian reservations, including the Mescalero Apaches (?). The Indian tribes now want good management. [277]

* * *

You might have a little different location, but you can still make a comparison. [285]

* * *

(Testimony of Vern A. Englehorn.)

A. From my observation it is good. These boys are top-notch farmers. I would like to have them farm some land for me.

* * *

Q. How many sales did you find in that area that gave you assistance in determining a market?

A. Of course, in that process of using comparable sales [290] you will start out with more sales than you use. You eliminate many of them. I think I wound up with about six.

Q. Six that you felt were more comparable than the other sales?

A. Well, actually, there were four. I used more than four, but four that I felt were really legitimate sales in the first place, and that the land was somewhat similar.

Q. All right, on those comparable sales would you start and describe the one that you think is the most comparable, or a comparable sale?

A. I found one sale that I felt—in the first place, let me explain this. I used some sales in '55 in my original assignment; and when the final date was decided, I threw them out because I felt they were too far distant in time. I think the sales I used were all '56 sales. There is one, for instance, up on Grand Avenue that sold in July of 1956. This property fronts for more than a mile on Grand Avenue just straight north of Luke Field.

Q. (By Mr. LaPrade): Where?

(Testimony of Vern A. Englehorn.)

A. Straight north of Luke Field on Litchfield Road in Section 4. [291]

* * *

Q. (By Mr. Eubank): You did consider that sale of July, 1956? A. Yes.

Q. What other sale did you consider?

A. I considered the sales that occurred on the west side of Luke Field that have been mentioned, and that is all. The dates and the price and the amount has not been mentioned in court as far as I know.

Q. What dates were those sales?

A. One of them was in December, or two of them in December, 1956—three of them, in fact, all in December, 1956.

Q. Who were those sales to?

A. Well, now, one of them was to Bill Robertson, a vegetable grower; and the other two were also to vegetable growers.

Q. What degree of comparability did those sales bear to the subject property?

A. Well, the productivity is about the same. They have water through there. It is a pump district. They are smaller properties, not as much, but they are planted to the same type of crops. They all have about the same percentage of cotton allotment on them as the subject property. They were in vegetables, and this is a good vegetable property; and so is the one west of it. They are not as well located from the [293] standpoint of accessibility, but you can get to them by going through

(Testimony of Vern A. Englehorn.)

Litchfield Park and going out Indian School Road. [294]

* * *

Q. In that regard, then, did you determine what the available uses were for that property on March 11, 1957? A. Yes.

Q. What, in your opinion, were the uses of that property?

* * *

The Witness: Well, its highest and best use is for farming purposes now. The highest and best use doesn't necessarily mean the final use to which a property can be put, but it means that you or I or any other investor like us—people are buying land for an increase in value that they expect to get a few years hence as a result of the population pressure that is on the land, but it may be ten or fifteen years hence before it is used for what they consider its highest and best use. So one use for land is for investment by an investor, and in the meantime he uses it for agricultural purposes.

Q. (By Mr. Eubank): And the higher use is what? [295]

A. Right now I would say its highest and best use is to be used for agricultural purposes, but possibly for an investor who is looking forward to a higher use later, like the man testified yesterday he would sell for \$1,000 an acre for subdivision purposes.

Q. When we speak of the use of property, we are

(Testimony of Vern A. Englehorn.)

thinking of a group of possibilities, aren't we? We are not ruling out various possibilities as the market affects the land?

A. No, we are not ruling out any possibilities that a normal buyer and seller would think of.

* * *

A. Yes, we have many examples of that right here in Phoenix. What was farm land a few years ago now is a shopping center.

Q. Your testimony is, then, that on March 11, 1957, the highest use of that property was what?

A. It was for agricultural production, but the normal buyer would be somebody who would have in mind that it goes up each year in value; so five years hence he probably would get more [296] for it.

* * *

Q. How about the little subdivision that is circled on the board there?

A. That wasn't much of a subdivision.

Q. In your opinion you would discount that?

A. I don't think that would ever have much possibility of being a subdivision. It had kind of proven that to me. The houses that were there were not attractive. I wouldn't want to build beside it, and I don't think a normal resident in the valley would, whether he was connected with Luke Field or not. [297]

* * *

(Testimony of Vern A. Englehorn.)

A Juror: What is that?

Mr. LaPrade: That is upon the land which was taken by the Government, and is a new structure put up by the Government. [302]

* * *

Q. What I am getting at, Mr. Englehorn, is the fact of whether in your opinion there was severance damage in this taking?

A. There are other factors that are considered, of course. Unfortunately, the Internal Revenue Law requires we do come up with a severance damage figure.

Q. In this figure, the \$93,000.00, does that include [318] any element of severance damage?

A. That figure would include some, if there is some, yes, in any before and after approach.

Q. Is that basically the purpose for the before and after approach? A. Well, yes.

* * *

Q. Of these various crops.

Now, you have heard their opinion, that it would be impossible after a certain date, I think it was June, when the cotton got to a certain height, to spray it with an airplane, because of its proximity to the Capehart housing [319] project, do you recall that? A. Yes.

Q. Do you have an opinion on that?

A. Well, it would interfere some, all right.

Q. Would it be possible, though, to continue, or

(Testimony of Vern A. Englehorn.)

do you know whether it would be possible to control insects and bugs with spraying other than by airplanes?

A. Well, some, yes. There are some sprays that are not injurious in any way to humans, and there are some that are.

In what degrees, I do not know exactly, and sometimes we do need to use those organic sprays that are a little bit dangerous. [320]

* * *

Q. There has been quite a bit of testimony about that. What would your opinion in regard to the shape of that farm after the taking be?

A. Well, of course, a compact unit like it was before is always more desirable than to have a piece taken out in [321] that manner. It had some effect on the value of it.

Q. And did you consider that in arriving at your market value?

A. Yes, I did.

Q. After the taking?

A. Yes.

Q. Now, I haven't divided the \$93,000.00 that you have come up with there into the 132.40 acres.

Have you done that?

A. Well, it rounds off at \$700.

Q. That would be at \$700 an acre?

A. Yes, approximately.

Q. Mr. Englehorn, when you looked over the area out there, and in determining just what the best use of this property is, did you look into the,

(Testimony of Vern A. Englehorn.)

well, the market factors in regard to subdivisoning that area?

A. In that particular area?

Q. Yes.

A. Well, I looked into the value of land in the area. I didn't see any subdivision activity, nor did anybody indicate to me that they were interested in the subdivision activity in that area.

Q. Did you, oh, say within five or six miles of the subject property find subdivision activity?

A. Well, that would be about the limit. I am not sure [322] how far Youngtown is from there, but the witness yesterday testified as to that figure, somewhere around six or seven miles, as I remember.

Q. That is the closest?

A. Then there is a subdivision, of course, it is not too far down to Litchfield Park. It is just three miles down to the town of Litchfield Park, to the south.

Q. Is there a subdivision development there?

A. There is one on the east side of Litchfield Park.

Q. Do you know how extensive that development is?

A. Of course, one was built there several years ago, and the newest one I believe covers 40 acres. I am not sure. That is as of that time.

Mr. Eubank: All right. No further questions.

(Testimony of Vern A. Englehorn.)

Cross-Examination

By Mr. LaPrade: [323]

* * *

Q. Can you tell us how much on a per acre average you have allowed for severance damage?

A. I have allowed a figure of \$9,000 for severance damage.

Q. Total of \$9,000? A. Yes.

Q. Allotted over 181 acres? A. 381.

Q. 381. I am sorry. Which would be——

A. Twenty some dollars per acre.

Q. Twenty some dollars per acre severance damage? A. Yes.

Q. As compared to the testimony of Mr. Atha, yesterday, I believe you were here, at \$300 per acre severance damage, do you recall that? [327]

A. Well, I don't recall his figure.

Q. If it was \$300.

A. If it was \$300, whatever it is, the record will show.

Q. You would be quite a little ways apart, wouldn't you?

A. I am not sure he understands what severance damage is.

Q. Let us assume he does.

A. Well, I am not about to.

Q. In any event, you are willing to say that there is some severance damage?

A. Oh, yes.

(Testimony of Vern A. Englehorn.)

Q. To the remainder of the farm, and you have allotted something for that, to the tune of \$9,000?

A. Yes.

Q. And you do not agree with Mr. Hansen, who testified that he allowed nothing?

A. If that's what he testified, obviously I don't agree. [328]

* * *

Q. Would you disagree with Captain Combs, with his [329] statement that on May 11, 1957, there was a need for housing in that area?

A. Every military base I know of has a need for housing.

Q. Have you had any personal experience in building, the building trade, the building business, subdivision business, that is.

A. Not subdivision. I have had experience in building buildings.

Q. Have you had any experience in researching the financial structure of our modern day subdivision developments and how they operate them?

A. Well, I am fairly familiar with it, but I am not in that business, so I am not as familiar with it as those who are.

Q. You are aware, are you not, that the customary successful method in this modern age, in this Valley, is for a developer to buy a tract, to subdivide it, to put his streets and curbs in, to build model homes, he arranges for financing, then the prospective purchasers come on and buy a package

(Testimony of Vern A. Englehorn.)

unit, with ready-made financing, and everything, isn't that the general idea?

A. You don't need to limit it to this Valley. That's the way it is all over the country.

Q. That wasn't the kind of operation Mr. [330] Weber conducted on his subdivision on Litchfield Road, which is south of the Rubenstein property, was it?

A. I didn't look into that one at all. I didn't know the owner was even Weber.

Q. You didn't consider it? A. No.

Q. You felt that particular property was not a comparable sale, that activity, that is?

A. The activity, I considered it from the standpoint of what was going there. It kind of showed what the demand was.

Q. Did you eliminate it, as you stated, from your final opinion as a sound basis of assisting you in arriving at an ultimate conclusion?

A. No, it just was a factor that I observed in the area, that seemed obvious to me there wasn't much demand for housing.

Q. You say there wasn't a demand for housing?

A. No, otherwise they would buy that up and build houses on it.

Q. Didn't you just testify there was a need for housing?

A. Oh, yes, there is a need for housing, but it is here in the Valley all over.

Q. The other sales which you considered comparable, was one of them the Rubenstein sale on

(Testimony of Vern A. Englehorn.)

the southeast corner [331] of Litchfield Road and Glendale Avenue?

A. I took a look at it, but I think it occurred in late 1953, as I remember.

Q. In point of time, in your opinion, then, it was remote to this case?

A. There were other sales that were much closer in date that I preferred to use.

Q. I am referring to that particular sale. Wasn't it in your opinion too remote to serve as an accurate guide or comparable sale, in arriving at values in this particular instance?

A. Of course, you don't throw everything out. You consider all sales. You don't blank them from your mind, but there are some you consider a lot more than others.

Q. Were the other properties you considered fronting on Glendale Avenue? A. No.

Q. Were they in front of Luke Field?

A. No.

Q. Were they producing three bales per acre on their cotton yield?

A. They were producing about that, and also vegetables.

Q. Where were they, sir?

A. One of them was on Grand Avenue, frontage on Grand Avenue. [332]

* * *

Q. And there may be a market for investors for their personal future speculative use?

(Testimony of Vern A. Englehorn.)

A. Right.

Q. Although it is a market, though, isn't it? [333]

A. Yes.

Q. And if there are people ready, willing and able to buy, even if it is for their own speculative future use, that is a market which must be considered, isn't that right?

A. Well, they set the market, the buyers in general set the market. If they are buying land at a set figure, that is the market.

Q. It doesn't make any difference what their motive is?

A. No, they are the buyers.

Q. Their motive is no concern of the appraiser, is it?

A. No, not necessarily. There are all kinds of reasons why people buy property.

Q. And before arriving at market value, don't you have to determine what is the highest and best use of this land, and what is the demand for that use in order to arrive at your market?

A. That is part of the process in arriving at the market value.

Q. And you stated you, you stated that you in recognizing differences in other comparable sales in the vicinity, you must consider the differences as well as the similarities? A. Right.

Q. Were you eliminating differences in arriving at [334] your opinion, or were you adding up comparisons? Which were you doing?

A. Well, it is hard—you understand that an

(Testimony of Vern A. Englehorn.)

appraisal process is an opinion value based on facts, and you can't use formulas like you can in other exact sciences.

It is not an exact science.

Q. Did you assume that farming was the only market value for this property?

A. I think I made it pretty clear on what I thought the use of that property was as of that date.

Q. Can you tell us any reason why an experienced subdivider could not have subdivided and built upon the land, and sold or rented units and earned a profit on his investment in March of 1957?

A. Why, now?

Q. Can you tell us any reason why not?

A. Well, there weren't any of them doing it in the area.

Q. I am asking you if there is any reason why it couldn't have been done by an individual, just as I say is being done by the Government?

A. Sure, he could have done it. He could have risked his capital if he wanted. That is his prerogative. He could have gone in there and do whatever he wants with it.

Q. You stated that you are not an expert as a chemist, [335] I believe you stated, in connection with this dusting business?

A. I think the record will show I said agricultural chemist, if that makes any difference.

Q. Agricultural chemist. And in that regard you do know enough about it to know that a cotton gin

(Testimony of Vern A. Englehorn.)

will not finance a farmer on a cotton crop if they suspect that in the midst of the season he will be prohibited from dusting his crop?

A. Well, I expect that is right, if he is sure of that.

Q. If that were to be the fact, your firm wouldn't be interested in loaning any money for Northwestern Mutual for that purpose, would you?

A. We don't loan on cotton crop. We loan on the land.

Q. Would it make any difference, sir, if it was just farm land, if it couldn't be farmed because of dusting difficulties? Your investment wouldn't be very good, would it?

A. Of course, actually here in the Salt River Valley, we loan just about as much money on the farm that doesn't have a cotton allotment as one that does. I say here in the Salt River Valley.

Q. Is that in the Salt River Valley?

A. Yes, in the Salt River Valley area. [336]

Q. I mean the Baker-Roach land, does that hold true there? A. Yes.

Q. And it is true when the cotton gets high enough, you can't very well do it by machine spray, can you?

A. No, it gets a little bit hard.

Q. If it is determined by experts in the field that there is a malady on the crop of some sort that needs to be dusted by plane, that is what you have to do to protect your crop, isn't it?

A. Of course, that was an opinion, too. It

(Testimony of Vern A. Englehorn.)

wouldn't be enough proof to me. You have seen them dust cotton, and they don't stop the traffic on the highway going right by their field. The highway goes right by cotton land they are spraying, and they don't stop traffic with a red flag.

Q. Do you have an opinion, as a layman, as to what might develop in a school, and in the middle of a housing project if there was dusting adjacent to it? A. I took that into consideration.

Q. Do you think it would have any effect on the remainder market value of this land?

A. Yes.

Q. How much did you allow for that?

A. I didn't allow any per-acre figure for that one [337] item, because there are some offsetting factors. [338]

* * *

Q. What is the best piece of that whole farm?

A. Of course, the best piece is the east half of Section 3, that 320-acre tract.

Q. Did you allow any speculative value on the frontage on Glendale Avenue, on arriving at your "before" value?

A. I arrived at the property as a whole, and I took into consideration the fact that it does front on Glendale Avenue.

* * *

Q. I take it, then, it is your opinion that Tract H-801 could not have been subdivided and economically developed on March 11, 1957?

(Testimony of Vern A. Englehorn.)

A. Possibly it can, but it is my opinion that it would not command more than \$700 an acre. [339]

Q. Are you acquainted with any land with a built-in demand for subdivision purposes anywhere in this Valley that can be bought for \$700 an acre?

A. That they are subdividing right now?

Q. No, sir, with a built-in demand.

A. You are assuming something there.

Q. I am assuming it for the purpose of my question to you. A. I can't assume that.

Q. Assuming that there is a need for housing on March 11, 1957, at or about Luke Air Force Base, and assuming that this land is suitable for subdivision, and assuming anything else you want to assume, is there any reason why it could not have been successfully subdivided and economically operated by a competent subdivider?

A. Well, of course, I don't know how you are going to assume all those things.

When you assume all those things, you are bound to come up with a wild figure. An appraiser uses facts. He doesn't assume anything.

Q. Doesn't a point of time come when land no longer has value for one purpose, and the point of no return is reached, and it takes on other values?

A. Yes, but that doesn't set the value. You are talking about income, now, aren't you? Market sets the value. [340]

Q. You are acquainted with the fact that the school district paid \$19,000.00 for 16 acres?

A. They got 19 acres.

(Testimony of Vern A. Englehorn.)

Q. They got 3 for free.

A. They got 19 acres for \$19,000.00, whichever way you want to look at it.

Q. Did you check the deeds on record?

A. Yes, the deeds are recorded, and the Warranty Deed is recorded, and simultaneously a gift deed is recorded, and the revenue stamps are in the amount of \$6.60.

Q. Did you assemble with the school officials to determine what the bargain was?

A. I agree with the figures that were recited this morning.

Q. You heard Mr. Baker's testimony in connection with having given the school district 3 acres?

A. Yes, sir.

Q. Do you have any quarrel with that?

A. No, that was after the date of taking.

Q. Then if negotiations were made, and the deal was sealed before the taking, you still wouldn't accept that \$1,100, approximately, for the 16 acres as a valid comparison?

A. Of course, you know we did it as of March 11th. That actually happened after that.

Their minds could have changed, you know, before [341] they finally signed it.

Mr. LaPrade: That is all.

(Testimony of Vern A. Englehorn.)

Redirect Examination

By Mr. Eubank: [342]

* * *

Q. So on Government's Exhibit 11, the first photograph, they can see the ground the way it was out there in December?

A. That is a waste ditch taking the water into the sump.

Q. And this would have been taken at the edge of the sump, I take it?

A. Just west of the sump.

Mr. Eubank: Do you have any objection to these? [344]

Mr. LaPrade: No. No objections. [345]

* * *

The Court: It now becomes the Court's duty to instruct you as to the law that applies to this case.

You know this is a condemnation suit brought by the United States under certain Acts of Congress. You are instructed that the case involves the taking by the United States of America for a public purpose of the fee simple estate or entire title to Tract No. H-801, consisting of 132.40 acres, described as follows:

Tract No. H-801, two parcels of land in the County of Maricopa, State of Arizona, described as follows:

Parcel 1, the Southwest one-half, Section 3, Township 2 North, Range 1 West, Gila and Salt River Basin Meridian, except the East 442 feet thereof.

Parcel 2, the North 100 feet of the East 442 feet, of the Southeast one-quarter of Section 3.

This tract, consisting of 132.40 acres, as I have stated, is a part of a farm unit owned by the defendants, consisting of 510 acres, more or less.

After the Government's taking, there remains 388 acres, more or less, on the defendants' farm.

The taking of property by the United States Government in the exercise of its power of eminent domain under the United States Constitution implies a promise to pay just compensation therefor. [352]

Just compensation, often referred to as market value, means the compensation which is just not only to the defendants, but to the Government.

In arriving at just compensation or market value, you are to determine the market value of Tract No. H-801 on March 11, 1957.

This date, March 11, 1957, is the date of taking, or the date on which the Government took the defendants' tract of land.

Consequently, the market value of Tract No. H-801 on March 11, 1957, is the only issue upon which you are asked to decide in this case.

I instruct you that by market value is meant the amount of money that the property in question will bring if sold in the open market under normal conditions, with a reasonable time within which to find a purchaser, the seller being willing but not

obliged or forced to sell to a buyer ready, willing and able, but not obliged to buy, and being allowed a reasonable time to investigate the property, and all the uses for which it is adapted.

In your deliberations on market value or just compensation, you are not to consider the price a tract of land would sell for under special or extraordinary circumstances.

You will consider only the market value of [353] the land—the market value of the land as if it were sold on the open market between a willing buyer and seller under ordinary circumstances on March 11, 1957.

It is not, therefore, a question of the value of the property to the defendants, or a question of the value of the property to the Government. It is a question of market value on March 11, 1957.

Just compensation includes all elements of value that inhere in the property. But it does not exceed market value fairly determined.

The sum required to be paid to Messrs. Roach and Baker does not depend solely upon the uses to which they have devoted their land. But it is to be arrived at upon just consideration of all the uses for which it is suitable, and the highest and most profitable use for which the property is adaptable and needed, or likely to be needed in the reasonably foreseeable future, is to be considered, not necessarily as the measure of the value, but to the full extent that the prospective demand for such use affects the market value while the property was privately held.

Elements affecting value that depend upon events or combination of occurrences, which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from your consideration, for that would be to allow mere speculation and conjecture to [354] become a guide for the ascertainment of value.

In this case where an entire tract has been used and treated as an entity, it should be so treated in determining market value.

As I stated before, Tract H-801 is a part of the farm unit owned by the Defendants.

It is a rule of law that in the condemnation of a part of a tract of land owned by the defendants, just compensation is the market value of the entire tract before the taking, minus the market value of the remaining tract after the taking of Tract H-801 on March 11, 1957.

The answer will be just compensation or market value of the tract taken by the Government, plus severance damage to the remaining tract, if any. This is commonly referred to as the "before and after" rule.

Severance damage is more easily described and defined.

For example, as in the case where only a part of a tract is taken from the owner, the owner's just compensation includes any element of market value arising out of the relationship of the part of the tract taken to the entire tract.

The injury to this relationship, and the element

of market value is often spoken of as severance damage.

The test of whether or not severance [355] damage exists in the taking is the existence of loss or impairment in the market value of the remaining land after the taking, which can be fairly attributed to the taking.

If you find from the evidence that by virtue of the taking of the 132.40 acres the value of the remaining land has decreased, then in order to determine the amount of money which the Defendant should recover in this proceeding, you will first find the fair and reasonable market value of the entire 510-acre tract of land at the time of the taking, and then you will find the fair and reasonable market value of the 380 acres of land which were left to them immediately after the taking.

The difference between these two figures will be the amount that they should recover.

If you find, on the other hand, that the taking of the 132.40 acres did not diminish the remaining 388 acres, that is, did not decrease or diminish its value, then the defendants would not be entitled to any severance damages, and you will award them simply the fair and reasonable market value of the 132.40 acres of land that were taken, said value to be determined as of the date of taking.

You are further instructed that the burden of proof is upon the defendants to establish by a preponderance of the evidence the existence and extent of severance damages, as well as the fair and

reasonable market value of the [356] portions of lands that were actually taken.

In applying the market value standard, no account is to be given to values for necessities peculiar to the Defendant or the Government. But consideration should be given only to such matters as would affect the ordinary willing buyer and seller in negotiating a fair price.

To reach this result, the Jury may consider all matters which would naturally influence agreement upon a price by buyers and sellers willing but not compelled to bargain.

Obviously, the uses to which the property may be put vitally affect its value, but use in this sense does not mean mere physical adaptability. It is use adaptability which concerns us.

Its value is to be determined as of the time of taking. It is use adaptability apparent at that time.

Since market value is the standard sought, it is use adaptability which would affect market value at the time of taking, that is, which would influence a seller or buyer arriving at a fair price then.

The above considerations limit the uses which may be shown.

The Defendants and not the Government have the burden of establishing by the fair preponderance of all the evidence—that simply means the greater weight of [357] the evidence—the market value of the lands taken.

By a fair preponderance of the evidence is not necessarily meant the greater weight and number

of the witnesses, but the greater evidence in weight and credibility.

In considering all the evidence in the case, the evidence that tends to establish a given fact outweighs the evidence to the contrary.

If after considering all of the evidence in the case, you find that the evidence upon any question is evenly balanced, you shall answer such question against the Defendant who has the burden of that issue, for in such a case there would be no preponderance in favor of such proposition.

You are instructed that the burden of proving the highest and best use of the property contended by the defendant landowners, as well as the burden of proving the fair market value of Tract No. H-801, rests with the defendant landowners whose property is taken, and not upon the Government.

Severance damage defined here earlier in these instructions must also be proven by a preponderance of the evidence by the defendant landowners.

A number of witnesses have testified as to their opinions of the value of the properties under consideration.

In connection with the opinion evidence in general [358] that has been produced in this case, the Court instructs you that opinion evidence is not a statement of fact, but is a mere statement of the witness' opinion.

It is your duty to determine whether such opinions are correct or erroneous, and in arriving at your conclusion you should consider the grounds upon which the witnesses based their opinions, their

experience and knowledge of the matters about which they testified, the evidence in the case, and the reasonableness or unreasonableness of their opinions as viewed in the light of their knowledge and experience, using in this connection your own common sense, knowledge and experience.

You are the sole judges of the credibility of the witnesses, and of the weight that should be given to their testimony, including the testimony of the opinion witnesses. With that, the Court has nothing to do.

It is the province of the Court to declare to you the law applicable to any phase of the testimony, and it is your duty to apply that law to the testimony, and to return a verdict in connection with the tract of land in accordance with both the law and the evidence.

You are the judge of the evidence of each witness, by the reasonableness or unreasonableness of his testimony; the means of knowledge of that about which he testifies, the manner and deportment of the witness while testifying, [359] his interest, if any he has, his bias or prejudice, if any he manifests, and give all the testimony the weight it should have in reaching a conclusion as to what is the truth of the case.

In passing upon the testimony in the case, you are to exercise your common sense, your reason, and your judgment in the light of your experience in life, and your observation of the conduct of people, in ascertaining from the whole testimony what the truth is, and base your verdict upon that.

You are not to consider any personal loss or gain to either party. Market value of the property on the date of taking is the only problem under consideration.

Now, a form of verdict has been prepared for your guidance, which reads:

“We, the Jury, duly impaneled and sworn in the above-entitled action, upon our oaths do find that the fair market value of the Baker and Roach land, Tract No. H-801, as of March 11, 1957, is dollars.”

Now, if severance damage is proved, you will insert in the blank on the form of verdict whatever sum you may agree upon as representing the difference between the fair and reasonable market value of the entire 510 acres immediately prior to the taking, and the fair and [360] reasonable market value of the 388 acres remaining after the taking.

If severance damage is not proved, you will insert in this blank space whatever sum you may agree upon as representing the fair and reasonable market value of the 132.40 acres of land that were actually taken as of the date of taking.

You will now retire from the courtroom for a few minutes.

(The Jury retired from the courtroom.)

The Court: Do counsel have any objections or exceptions to the instructions?

Mr. Eubank: I have two objections on the instructions, if the Court please.

First, the Court erred in failing to give Plaintiff's requested Instruction No. 7, relating to comparable sales.

If comparable sales are the best guide to market value, the Jury should be informed of this fact, especially in this case where speculation and conjecture are the basis for the Defendants' theory of the case.

Two, the Court is committing error by failing to give Plaintiff's requested Instruction No. 11, the first paragraph thereof.

The condition of the Defendants' farm has [361] changed since the date of taking, March 11, 1957, and the date of the view, November 21, 1958.

The Jury should be clearly advised that they are not to consider the present activity by the Government on Tract H-801, as the construction work which they saw was subsequent to the date of taking.

The Court: All right.

Mr. LaPrade. I have no objections to the instructions, your Honor.

The Court: All right. Will you call in the Jury again, please.

* * *

[Endorsed]: Filed May 7, 1959. [362]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD
ON APPEAL

United States of America,
District of Arizona—ss:

I, William H. Loveless, Clerk, of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records of said Court, including the records in the case of United States of America, Plaintiff, vs. Arthur E. Baker, Doris M. Baker, John L. Roach and Bettie Jo Roach, et al., Defendants, numbered Civ-2597 Phoenix, on the docket of said Court.

I further certify that the attached original documents bearing the endorsements of filing thereon are the originals of said documents filed in said case, and that the attached copies of minute and civil docket entries are true and correct copies of the originals thereof remaining in my office in the City of Phoenix, State and District aforesaid.

I further certify that the said documents, together with the original exhibits transmitted herewith, are certified as the record on appeal in said cause, and the same are as follows, to wit:

1. Plaintiff's Complaint.
2. Plaintiff's Notice of Condemnation.
3. Plaintiff's Declaration of Taking.
4. Order for Delivery of Possession.
5. Stipulation that Defendants shall be permitted to remain in possession until September 1, 1957.

6. Stipulation that Defendants Baker and Roach be permitted to remain in possession until November 1, 1957.

7. Answer of Defendants Baker and Roach to Complaint.

8. Plaintiff's Motion to Strike Portions of Defendants Baker and Roach Answer.

9. Requested Instructions.

10. Verdict.

11. Plaintiff's Motion for New Trial.

12. Minute entry of December 15, 1958 (Order denying Motion for new trial).

13. Final Judgment as to Tract No. H-801.

14. Plaintiff's Notice of Appeal.

15. Motion and Order Extending Time for Filing Record and Docketing Appeal ninety days.

16. Reporter's Transcript.

17. Designation of Contents of Record on Appeal.

18. Civil Docket Entries.

I further certify that the following original exhibits are transmitted herewith as a part of this record on appeal, as designated, to wit:

Government's exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, in evidence.

Defendants' exhibits A, B, C, D, E and F, in evidence.

Witness my hand and the seal of said Court this 8th day of May, 1959.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 16461. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Arthur E. Baker, Doris M. Baker, John L. Roach and Bettie Jo Roach, Appellees. Transcript of Record. Appeal From the United States District Court for the District of Arizona.

Filed and Docketed: May 11, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16,461

UNITED STATES OF AMERICA,

Appellant,

vs.

ARTHUR E. BAKER, et al.,

Appellees.

STATEMENT OF POINTS ON APPEAL

The United States of America, appellant, intends to rely on the following points in its appeal:

1. The District Court erred in refusing to grant the Government's requested instruction number 7 as follows:

Comparable sales at arms length in the open market of real property, often referred to as similar sales, that occurred before the date of taking are the best evidence of market value.

2. The District Court erred in refusing to grant so much of the Government's requested instruction number 11, as follows:

With regard to the view that you took of Tract H-801 Friday afternoon, you are directed to remove from your consideration of market value the fact that the Government is presently making use of the condemned tract of land. You are to value the tract in the condition that it was in on March 11, 1957. The testimony of the

Government's and Defendants' witnesses will be helpful to you in recreating the condition of the tract at that time.

You are further instructed that Defendants are not entitled to compensation for loss of any future gain they might have hoped to realize from the tract over and above its fair market value. This is true also with respect to the Government. * * *

3. The District Court erred in failing to rule that comparable sales were the best evidence of market value.

4. The District Court erred in failing to rule that the use made of the property by the Government after the date of taking should not enter into the consideration of market value on the date of taking.

5. The District Court erred in failing to grant the Government's motion for new trial.

UNITED STATES OF

AMERICA,

PERRY W. MORTON,

Assistant Attorney General;

ROGER P. MARQUIS;

/s/ ROBERT S. GRISWOLD, JR.,

Attorneys, Department of

Justice, Washington 25, D.C.

Certificate of Service acknowledged.

[Endorsed]: Filed May 28, 1959.

[Title of Court of Appeals and Cause.]

STIPULATION

Comes Now the appellant, United States of America, by Perry W. Morton, Assistant Attorney General, and the appellees, Arthur E. Baker, Doris M. Baker, John L. Roach, and Bettie Jo Roach, through their attorneys, Louis B. Whitney and Paul W. LaPrade, and herewith stipulate and agree that in the foregoing cause on appeal to the United States Court of Appeals for the Ninth Circuit, that those certain exhibits of record in evidence that have been counter-designated by the appellee for inclusion in the record of said cause on appeal, to wit:

Defendants' Exhibit A in evidence: Map to scale.

Defendants' Exhibit B in evidence: Aerial photograph.

Defendants' Exhibit C in evidence: Aerial photograph.

Defendants' Exhibit D in evidence: Irrigation Map.

Defendants' Exhibit E in evidence: Land use map.

need not be printed as such in the record of said appeal, but rather, may be considered by the Court as a part of the designated record on appeal in their original form, as certified to the Court by William H. Loveless, Clerk of the United States

District Court for the District of Arizona, in his
certificate of record bearing date of May 8, 1959.

Dated this 22nd day of July, 1959.

THE UNITED STATES OF
AMERICA,

Appellant,

By /s/ PERRY W. MORTON,
Assistant Attorney General.

ARTHUR E. BAKER,
DORIS M. BAKER,
JOHN L. ROACH, and
BETTIE JO ROACH,
Appellees,

By /s/ PAUL W. LaPRADE,
Attorney for Appellees.

[Endorsed]: Filed July 27, 1959.

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

ARTHUR E. BAKER, DORIS M. BAKER, JOHN L. ROACH
and BETTIE JO ROACH, APPELLEES

**Appeal From the United States District Court
for the District of Arizona**

BRIEF FOR THE UNITED STATES, APPELLANT

PERRY W. MORTON,
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FILED

JAN 22 1960

FRANK H. SCHMID, CLERK

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National Housing Act, Title VIII, 12 U.S.C. secs. 1748-1748h	19

**In the United States Court of Appeals
for the Ninth Circuit**

No. 16461

UNITED STATES OF AMERICA, APPELLANT

v.

ARTHUR E. BAKER, DORIS M. BAKER, JOHN L. ROACH
and BETTIE JO ROACH, APPELLEES

**Appeal From the United States District Court
for the District of Arizona**

BRIEF FOR THE UNITED STATES, APPELLANT

OPINION BELOW

The district court did not write an opinion. The final judgment is printed at R. 27.

JURISDICTION

This is an appeal from a final judgment of the district court in a condemnation proceeding entered on January 2, 1959. Notice of appeal was filed on February 10, 1959. The jurisdiction of the district court was invoked by the United States in these condemnation proceedings under 28 U.S.C. sec. 1358.

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the court erred in refusing to instruct the jury that comparable sales are the best evidence of market value.

2. Whether the court erred in refusing to instruct the jury that the use to which the Government devoted the land after the taking should be removed from their consideration of market value.

STATEMENT

This action is for the taking, under the power of eminent domain, and for the ascertainment and award of just compensation to the owners and parties in interest, of a single tract of land consisting of approximately 132.4 acres.¹ The complaint was filed on March 11, 1957, together with a declaration of taking and a deposit of estimated just compensation (R. 3-10). The land taken was formerly part of a 513-acre truck and cotton farm lying approximately midway on the road joining Luke Air Force Base with Phoenix, Arizona, about 15 miles distant. The parcel was taken for the purpose of constructing housing for personnel assigned to the air base. Sec. 505 of the Act of September 28, 1951, 65 Stat. 336, 365. Trial was begun on November 19, 1958, on the issue of compensation, and concluded with the jury

¹ The determination of just compensation of the other tract described in the complaint was separately tried and is not involved on this appeal.

returning a verdict of \$165,500 on November 25, 1958 (R. 25). The testimony can be briefly summarized as follows:

Mr. J. Leslie Hansen, a professional real estate appraiser, testified for the Government that the highest and best use of the land was for farming purposes, with some speculative value along the highway, and not residential for the reason that a housing development one-half mile from the instant land was having serious selling difficulties (R. 50, 51-54). The witness testified that the Military Housing, Wherry and Capehart projects² played a significant part in his consideration of the highest and best use of the land because, "Those acts were on the books for the purpose of providing housing to the bases" where, "because of the lack of soundness of investment to the private builder, there has been little or no private building of housing in the vicinity of the military bases" (R. 86). Permanency of the military facility is immaterial, "inasmuch as it is created by an act of Congress, an act of Congress can deactivate it" (R. 87). Therefore, the witness continued, since the instant situation is one where Capehart housing was required to fill the need, it follows that private investment had not been available (R. 87). He valued the

² "Wherry Projects" were undertaken by private interests with the aid of Government assistance in financing, etc. See *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253 (1956). "Capehart" housing is the more recent form of military housing which will be operated by the Government after private builders have completed construction.

land on the basis of comparable sales (R. 50, 55-56) at an average of \$700 per acre for a total of \$92,680.

Mr. Vern A. Englehorn, engaged in farm management, appraisals and operations, testified for the Government that the highest and best use was for farming purposes with some investment value for future population expansion (R. 162). Mr. Englehorn added that no one had indicated any interest in subdivision activity in the area (R. 166). On the basis of comparable sales, in his opinion, the land had a market value of \$93,000 including severance damages (R. 160-162, 165).

Mr. R. R. McGrew, a land planning consultant, testified for the former owners that for various reasons the highest and best use for the land taken was for commercial and residential development (R. 44). Louis J. Combs, Captain, USAF, Information Officer at Luke AFB, testified for the owners that there was a need for off-base housing for personnel stationed at Luke (R. 48), and that the instant project would "alleviate" the housing problem (R. 48-49).

Mr. Bert Cavanagh, a professional real estate appraiser, testified for the former owners that, because the land was close to the source of sales—Luke AFB—and because the land itself was adaptable, the highest and best use for the land was for a housing development, multiple dwelling-unit development and a commercial shopping center (R. 100-101). Mr. Cavanagh further stated that the change to a permanent status of Luke AFB had the effect of giving stability to a base which might otherwise have been withdrawn and thereby eliminate the need for hous-

ing. The change to permanent status obligates the Government "to take and provide some adequate housing which was not necessary before" (R. 105). Expressly stating that there were no sales available which he considered comparable in arriving at his estimate of market value, Mr. Cavanagh testified on the basis of his experience that in his opinion the land was worth \$269,280, or an average of \$2,000 per acre (R. 103, 106). Assuming the highest and best use to be agricultural, he valued the land taken at \$145,200, plus severance damages to the remainder of \$139,200 (R. 119-120).

Mr. Robert L. Blake, a professional appraiser and valuation engineer, testified for the owners that the highest and best use for the property was for residential, multiple housing and commercial development (R. 127). He stated that the population trend in recent years had been in the general direction of the instant land from Phoenix (R. 121-122). While stating that there was a demand for housing at the time of taking, Mr. Blake also declared that under the Wherry and Capehart housing programs, the Government would supply that need where private capital was not forthcoming (R. 127-128). Although he stated he found no comparable sales in the area, he did state he used unspecified "similar sales of similar land" in arriving at a valuation of \$232,300 for the land taken (R. 123, 129, 135).

Mr. Herbert V. Atha, in the business of making farm loans, testified for the owners that the land, in his opinion and on the basis of his general familiarity with farm values, had a fair market value for farm-

ing purposes of \$218,300, including severance damages to the remainder (R. 144, 148). Mr. Arthur E. Baker, an owner, testified that in his opinion, conceding that "it might be a little bit biased", the market value of the land taken was \$293,400 (\$3,500 per acre for 32 acres, and \$1,800 for the remaining 100 acres), considering its highest and best use to be for commercial and residential development (R. 155-156). Mr. Baker also testified that he had purchased the land in 1953 for \$355 per acre (Original Transcript, pp. 272, 273-274).

In summary, then, two fundamental issues appear. The Government's witnesses testified that the highest and best use of the land was for farming purposes. This was in direct conflict with the testimony of the owners' witnesses in whose opinion the highest and best use was for commercial and housing development. The use, or nonuse, of comparable sales in arriving at estimates of market value was the second fundamental point of contention; for the Government's experts relied heavily on such sales as a basis for their estimates, while the owners' witnesses relied almost entirely on their general familiarity with the area. The testimony relative to comparable sales is detailed as follows:

Mr. Hanson, testifying for the Government, said that he took into consideration all the sales that had occurred in the area associated in time with the date of taking. One sale to which he attempted to testify was excluded by the court because the date of sale, 1953, was too remote in time (R. 49). Some of the sales he considered were in the area east of the sub-

ject property. He testified that he "looked at them all, and took into consideration what they were, the types of farm, and the type of operation, the water conditions so far as the subject sales of the comparable sales is concerned, * * * " (R. 50). The witness also considered some 15 sales 8 to 10 miles away in the Adaman Irrigation District and compared the instant property with its water with that of the Adaman farms which had practically an unlimited amount of water superior to the instant land, in an area that had been "sought after by, and invaded by the vegetable growers" (R. 50, 55-56, 57). The witness stated that the Adaman farmland was selling for approximately \$600 an acre; and based upon these considerations, then valued the instant land at the figure of \$700 per acre, being the sum of \$500 for the land alone, plus \$200 per acre for its speculative value along the road (R. 56, 57, 65).

On cross-examination the owners attempted to attack the comparability of the sales on the grounds that the lands involved were on the far side of Luke AFB, uncultivated, and that the instant land had sufficient water for agricultural purposes (R. 58-88).

Mr. Englehorn testified for the Government that comparable sales might have a little different location, but a comparison can still be made (R. 159). He used basically four comparable sales in arriving at an opinion of market value: a July 1956 sale of farmland which was located north of Luke Field, and three sales in the Adaman district. He eliminated sales made in 1955 or earlier as too remote in time (R. 160-161). When asked the degree of compara-

bility of the Adaman farmland to the subject property, the witness replied: "Well, the productivity is about the same. They have water through there. It is a pump district. They are smaller properties, not as much, but they are planted to the same type of crops. They all have about the same percentage of cotton allotment on them as the subject property. They were in vegetables, and this is a good vegetable property; and so is the one west of it. They are not as well located from the standpoint of accessibility, but you can get to them by going through Litchfield Park and going out Indian School Road" (R. 161-162). On cross-examination, the owner attempted to distinguish the comparable sales in the Adaman district because of their location on the opposite side of Luke AFB and by the commercial possibilities of the subject property (R. 170).

Mr. Cavanagh, testifying for the owners, stated that comparable sales are very much of value in determining market value, but that on the two or three occasions he had studied the vicinity he had found no comparable sales (R. 103). Several reasons were stated by the witness as to why he could find no comparable sales: "One is, first, location. Next is the size of the land. The fact they were not as close to the source that I felt needed housing, and that the terrain of the land was such that it was washy, so as comparing for comparable area or land for the subject property, I honestly could not find one. I just couldn't find one" (R. 103). In the absence of comparable sales as a guide, Mr. Cavanagh stated that one used his "experience that is gained over a period

of years, where you have either developed some other property, or have purchased other property, and had developed it, that could be developed with the same method that this particular piece of property could be developed" (R. 111).

On cross-examination Mr. Cavanagh admitted that comparable sales were the best evidence of market value, but reiterated that he had found none in the vicinity (R. 114). He eliminated the Adaman farm sales as comparable because, although in some instances only a mile away, they were on the far side of Luke away from the population centers, and because the instant land is on an arterial road between Luke and Phoenix (R. 115-116).

Mr. Robert Blake, testifying for the owners, stated that he had made an exhaustive search for comparable sales, but had found none (R. 123). The instant property, he said, was desirable because of its location on the main route between Luke and Phoenix, handy to Luke but away from the noise area, and on the side of the base toward development. The terrain was good, level land in cultivation (R. 124). The sales he found in the area were discounted because, "They were different kind of land, located in a different relative position, a different type of terrain, not cultivated, various things. Something made every one of them, every piece of land that I found in the possibly 10-mile radius—I don't think I went that far, say, 10 miles diameter, 5-mile radius—every one of them had some element that would not measure up to this land. * * * They were all different kind of land. There were some sales during that

period, but they were all different kinds of land" (R. 125). He further stated that since he found no comparable sales in the immediate vicinity, he examined other areas "on the fringe of development" to find an indication of values of lands ready for development (R. 126-127). On cross-examination, the witness stated that the Adaman sales were "comparable in no way at all" (R. 132). He said, also, that comparable sales were truly correct guides to market value, and went on to state that, "The fact that your properties are not exactly comparable is probably true in most cases. However, using the comparable sales method does not intend to use a resolving of differences method." Therefore, he explained that a consideration of the Adaman sales would have been resolving differences, rather than drawing comparisons, and were excluded for that reason (R. 132-133). On redirect he stated further that, "You must find lands that in virtually every test, in nearly every measure is comparable" (R. 134). Then on recross he stated that the similar lands he used as a guide were six or seven miles away from the instant land. "That is the one difference. The other factors are all quite similar, and I think these are similar enough to use these lands as a guide" (R. 135).

In view of these conflicts, the Government requested certain instructions clarifying these particular issues for the jury and for their guidance in reaching a verdict as to fair market value in accordance with applicable principles of law. The court refused the Government's request to instruct the jury as to

the evidentiary value of comparable sales that (R. 20-21):

Comparable sales, at arms length, in the open market of real property, often referred to as similar sales, that occurred before the date of taking, are the best evidence of market value.

The court further refused to give the instruction requested by the Government that the jury should remove from their consideration of market value the fact that the Government was presently making use of the land for housing purposes at the time they viewed the property (R. 24). The instruction as requested reads:

With regard to the view that you took of Tract H-801, Friday afternoon, you are directed to remove from your consideration of Market Value the fact that the Government is presently making use of the condemned tract of land. You are to value the farm in the condition that it was in on March 11, 1957. The testimony of the Government's and Defendants' witnesses will be helpful to you in recreating the condition of said tract at that time.

You are further instructed that the Defendants are not entitled to compensation for loss of any future gain they might have hoped to realize from the tract over and above its fair market value. This is true also with respect to the Government. *You are not to consider any personal loss or gain to either party. Market value of the property on the date of taking is the only problem under consideration.*

Only the italicized portion was given (R. 185).

The jury found that the fair market value of the land taken was \$165,500 (\$1,250 per acre) (R. 25). The jury apparently found no severance damages to the land remaining. The Government's motion for new trial (R. 25-26) was denied (R. 27) and final judgment was entered on January 2, 1959 (R. 27-31). A notice of appeal therefrom was filed on February 10, 1959 (R. 32).

SUMMARY OF ARGUMENT

I

In the instant proceeding the Government's expert appraisers arrived at their estimates of fair market value using as a starting point for their opinions what comparable land had changed hands for on the open market. The courts have uniformly held comparable sales to be the "best evidence of market value," and "a sound rule of law as well as of common sense." This is necessarily so since the object is to determine what the property would have sold for between the willing buyer and the willing seller. The owners' witnesses, on the other hand, relied primarily on their personal experience and familiarity with the area. In the absence of comparable sales market value has been characterized by the Supreme Court as being "at best, a guess by informed persons." There is no question that comparable sales are the best evidence of market value. We submit, that the court was clearly in error in refusing to guide the jury to apply a correct standard of value by so instructing them.

II

The wide disparity between the testimony on behalf of each party is explained for the most part by the difference in views as to the land's highest and best use. It became an issue of crucial importance for the former owners to establish that the land was best adapted for the more valuable housing and commercial uses. To this end it was necessary to show that a probable demand existed for those uses. One of the foremost principles of just compensation is that evidence of such demand is limited to the needs and necessities which can be met by private business. A purely governmental project cannot be used to show demand, because it would not be a factor of consideration entering into market value between the proverbial willing buyer and willing seller. Thus, in the instant case, the effect of the housing project as evidence of the demand for housing should have been eliminated from the minds of the jurors, because it was not representative of demand which could be met by the private investor. The project came into existence only because private investment in housing for Luke AFB personnel had not been forthcoming. The jury at its view would obviously be impressed by the housing project which was then being constructed on the land. Accordingly, it was clear error for the court to have refused the Government's instruction to the effect that the use to which the Government placed the land after the taking should not have been considered in their determination of market value.

ARGUMENT

I

**The Court Erred In Refusing To Instruct The Jury
That Comparable Sales Are The Best Evidence Of
Market Value**

The object in this proceeding, as in any condemnation proceeding, was the determination of the fair market value of the land taken by the Government, in other words, what the property would have sold for on the open market between a willing buyer and a willing seller. *United States v. Miller*, 317 U.S. 369, 374-375 (1943). The first step taken by any reasonable man purchasing property is to apprise himself of what other property is selling for in the same neighborhood. A sound basis is thus formed upon which to ascertain relative land values. A valuation where available sales of physically comparable land are ignored is a departure from the standard of actual sale value.

In the instant case, the land involved was farmland. The Government's experts, therefore, used recent sales of other farmland which were physically comparable in proximity to the subject farm and not remote in point of time. A basis was thus established for determining the relative market values of land in the area having reasonably the same physical characteristics. To this basis was added an increment of value for the possibility of commercial development. On the other hand, the owners' witnesses rejected out of hand all of the comparable sales, and formed their opinions almost entirely from their personal experience and familiarity with the area. As

this Court has said "Opinion evidence is only as good as the facts upon which it is based." *State of Washington v. United States*, 214 F.2d 33, 43 (C.A. 9, 1954), cert. den. 348 U.S. 862. See also *United States v. Honolulu Plantation Co.*, 182 F.2d 172, 178 (C.A. 9, 1950), cert. den. 340 U.S. 820; *International Paper Co. v. United States*, 227 F.2d 201 (C.A. 5, 1955). Actual sales are facts demonstrating the action of parties in actual payment of a sum of money as contrasted simply with expert opinion that they would have been wise to invest their money in a certain way. In this connection the admonition of Mr. Justice Holmes should be kept in mind. He said that "what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give * * *." *New York v. Sage*, 239 U.S. 57, 61 (1915).

With no instruction relating to the weight to be given to sales of comparable property as evidence of fair market value, the jurors were left with no clear guide to choose between the unreliable testimony of the owners' witnesses based on their personal experience and the Government's testimony based on actual facts—that is the prices which have actually been paid for property in the vicinity.

The courts have uniformly held that under these circumstances such an instruction should be given. Squarely in point here is *United States v. 5139.5 Acres of Land, etc.*, 200 F.2d 659, 662 (C.A. 4, 1952),

where the court held that this precise instruction “embodied a sound rule of law as well as of common sense.” Likewise, in *United States v. Ham*, 187 F.2d 265, 270 (C.A. 8, 1951), when the same question was presented, the court held that the lower court was in error when “it refused to tell the jury to take into account and consider what land in the neighborhood was being sold for at the time of taking.” These cases represent the application of the settled principle that “What comparable land changes hands for on the market at about the time of taking is usually the best evidence of market value available.” *Baetjer v. United States*, 143 F.2d 391, 397 (C.A. 1, 1944), cert. den. 323 U.S. 772. The instruction requested in the instant case virtually quoted the identical language used approvingly in *Welch v. Tennessee Valley Authority*, 108 F.2d 95, 101 (C.A. 6, 1939), cert. den. 309 U.S. 688, holding, “Sales at arms length of similar property are the *best* evidence of market value.” [Emphasis supplied.] To the same effect is this Court’s opinion in *United States v. Honolulu Plantation Co.*, 182 F.2d 172, 176 (C.A. 9, 1950), cert. den. 340 U.S. 820. Cf. *United States v. Toronto Nav. Co.*, 338 U.S. 396, 402 (1949); *Kinter v. United States*, 156 F.2d 5 (C.A. 3, 1946); *United States v. 13,255.53 Acres of Land, etc.*, 158 F.2d 874, 876 (C.A. 3, 1946); and *Lyons v. United States*, 99 F. Supp. 429, 432 (W.D. Pa., 1951).

As the court has recently emphasized in *United States v. Lowrie*, 246 F.2d 472, 474 (C.A. 4, 1957), evidence of sales of comparable properties is “one of the most persuasive indications of market values and

one of the most reliable checks upon expert opinion." We submit, that it is especially important that the jury be instructed as to weight of such sales in a case like the present one.

II

The Court Erred In Refusing To Instruct The Jury Not To Consider The Use Made Of The Property By The Government After The Date Of Taking

The extent to which the value of the land was affected by the probability of using it for commercial and housing development was of fundamental importance. Using no comparable sales, the owners valued the land, not in its use at the time of taking plus a factor for the probability of commercial development, as did the Government witnesses, but in a status which assumed that the probability of development had reached the level of actuality. In other words, the owners' witnesses valued the land as if it were already being used for what they asserted was its highest and best use; and, accordingly, valued the land as housing and commercial development property. This was the justification they gave for ignoring actual sales in the vicinity. Such a process is contrary to established law which requires that the land be valued in its present condition, i.e., farmland with a probability of commercial development. *United States v. Meadow Brook Club*, 259 F.2d 41 (C.A. 2, 1958), cert. den. 358 U.S. 921. In that case the former owners sought to have the land taken valued as industrial property. At the time of taking, however, the property was zoned residential, although proceedings to rezone as industrial were pending and

a reclassification would have been consistent with the surrounding area. The court stated the applicable rule as follows (at page 44) :

Just compensation compatible with the requirements of the Fifth Amendment is the fair market value of the condemned property just prior to the taking. *U.S. ex rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266; *United States v. Miller*, 317 U.S. 369, 374, 147 A.L.R. 55; *McCandless v. United States*, 298 U.S. 342. This evaluation should reflect not only the purpose for which the property has theretofore been used, but other uses which might render it more profitable. *Olson v. United States*, 292 U.S. 246. *It would be improper to value the property as if it were actually being used for the more valuable purpose.* But the "extent that the prospect for demand for such use affects the market value while the property is privately held" should enter into the calculation. *Olson v. United States, supra*, 292 U.S. 246, 255. Obviously the more profitable operation must be one allowed by law to be carried out on the premises. Thus if existing zoning restrictions preclude a more profitable use, ordinarily such use should not be considered in the evaluation. *Westchester County Park Commission v. United States*, 2 Cir., 143 F. 2d 688, certiorari denied 323 U.S. 726. On the other hand if there is a reasonable possibility that the zoning classification will be changed, this possibility should be considered in arriving at the proper value. [Emphasis supplied.]

The admission of evidence of demand is qualified by the condition that only the needs can be shown

which can be also met "while the property is *privately held*." [Emphasis supplied.] It is submitted, therefore, that under the circumstances present herein, the fact that the Government had begun construction of a housing development on the land was inadmissible for the purposes of showing that the market would pay more for the farmland because of the probability of use for housing purposes; and, accordingly, it was highly prejudicial for the jury to view the project in its advanced stages of construction, without some qualification from the court to dismiss from their deliberations, the present use to which the Government was putting the land.

The very reason that the Government was taking the land for a housing project, was that private industry had refused to commit private funds for the venture. This fact was clearly recognized by witnesses for both parties, *supra*, pp. 3, 5. That private demand was nonexistent was the basic premise which compelled the Government to promote this housing project, for Wherry and Capehart housing is provided through Government financial backing only where available housing cannot fill the public need.³

³ Section 505 of the Act of September 28, 1951, 65 Stat. 336, 365, in authorizing appropriations for the instant housing project, stated that such project would be under the terms of Title VIII of the National Housing Act, 12 U.S.C. secs. 1748-1748h (Wherry Housing Act), which provides for federal mortgage insurance, "In order to assist in relieving the acute shortage and urgent need for family housing which now exists at or in areas adjacent to military installations because of the uncertainty as to the permanency of such installations * * *." Section 1748b(a).

Obviously, where private enterprise has refused to accept the financial risks attendant with projects of this type without Government backing, because of constant change in military requirements and resultant change in housing needs, the instant housing project cannot conceivably be evidence of a demand for housing which affects market value as between the willing buyer and the willing seller.

Demand which can be met only by the Government cannot be equated to the needs which might be met by the business community in determining the effect for valuation purposes of a particular use of the property. *Boom Co. v. Patterson*, 98 U.S. 403, 408 (1878); *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 76-77 (1913). In other words, demand cannot be shown by the Government's activities. Here, the private investor is as effectually precluded, for financial reasons, from meeting the only real demand present as he would be in the case where land is taken for a purely governmental project beyond the reach of the ordinary investor. *Olson v. United States*, 292 U.S. 246 (1934). The demand must be such that it can be met by a private investor. *Cameron Development Co. v. United States*, 145 F.2d 209 (C.A. 5, 1944); *United States v. Rayno*, 136 F.2d 376 (C.A. 1, 1943), cert. den. 320 U.S. 776. This Court took the same position in *Polson Logging Co. v. United States*, 160 F.2d 712, 717 (C.A. 9, 1947), when it approved an instruction given by the lower court. This Court stated that " * * * while the court properly charged the jury that they should not consider the government's need for the property, nor its

value to the government upon acquisition, they were told that nevertheless, if they found that the property has a special utility or availability value not only to the government, but to others, then such value should be considered in connection with what the jury might find a purchaser would pay for the property." See also *United States v. Foster*, 131 F.2d 3 (C.A. 8, 1942), cert. den. 318 U.S. 767.

When the jury viewed the property, saw the housing project on it,⁴ and heard all the testimony to the effect that the land was taken for a Government housing project, they certainly could have drawn the conclusion that the Government's project was evidence of the general demand for housing among private developers. The jury should have been instructed, as required by the law and the circumstances of this case, to exclude from their determination of market value the use to which the Government was putting the property.

The refusal to give the requested instruction also violated the settled principle that the United States should not be required to pay for value it alone creates. *United States v. Miller*, 317 U.S. 369 (1943); *United States v. Cors*, 337 U.S. 325 (1949). To enhance value because of the Government's need for the land as a site for a Wherry project—which was needed because private financing was unavailable—is clearly an attempt indirectly to capitalize on

⁴ "A Juror: What is that?"

"Mr. LaPrade: That is upon the land which was taken by the Government, and is a new structure put up by the Government" (R. 164).

the Government financing of the very project for which the land was taken. This violates the *Miller* and *Cors* rule of fairness.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment below must be reversed with directions for a new trial to ascertain just compensation according to the correct legal principles.

Respectfully,

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JANUARY 1960

No. 16,461

In the
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

VS.

ARTHUR E. BAKER, DORIS M. BAKER, JOHN L. ROACH
and BETTIE JO ROACH,
Appellees.

Appeal from the United States District Court
for the District of Arizona

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FILED

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No. 16461

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

ARTHUR E. BAKER, DORIS M. BAKER, JOHN L. ROACH
and BETTIE JO ROACH,

Appellees.

Appeal from the United States District Court
for the District of Arizona

Brief for Appellees Arthur E. Baker, et al.

JURISDICTION

Appellees concur in Appellant's statement of jurisdiction and adopt same verbatim herein.

PRELIMINARY STATEMENT

The Government's statement of the case is inadequate for it omits the key evidence in support of the verdict and the circumstances and issues which justified the Court's denial of the two instructions complained of. To fully understand and appreciate the District Court's action, appellees feel compelled to enlighten the Court in this regard.

PHYSICAL FACTS

Luke Air Force Base (L.A.F.B.) lies fifteen miles northwest of Phoenix, Arizona, six miles southwest of Youngtown, Arizona, seven miles west of Glendale, Arizona; and L.A.F.B. and Glendale are connected by Glendale Avenue, an arterial highway which ends at the Air Base. It intersects Litchfield Road, which runs north and south connecting Litchfield, Arizona, approximately three miles south, to the Air Base (R-106). Dysert Road runs north and south and intereseects Glendale Avenue one mile east of the Air Base.

Appellees' 510-acre farm consisted of 330 acres on the northwest corner of Glendale and Dysert, 60 acres on the southwest corner, and 120 acres on the northeast corner. The 132.6 acres taken in this proceeding was out of the 330-acre tract fronting on Glendale Avenue, and was the most valuable portion of the farm (R-111). The lands were physically adaptable to residential housing and commercial uses with a developed water supply and an adjacent arterial highway (R-41, 42). The tract taken was outside of the "Noise Clearance Zone," with reference to L.A.F.B., as established by the U. S. Corps of Engineers (R-40). The northwest and southwest corners of the intersection of Dysert Road and Glendale Avenue had, before the date of taking, been zoned for commercial uses by the Maricopa County Planning and Zoning Commission (R-43). The southeast corner of Litchfield Road and Glendale Avenue then was devoted to commercial uses (R-42), as was frontage on the south side of Glendale Avenue, approximately one-half mile east of appellees' farm, to-wit: a trailer court (R-38).

The L.A.F.B. total population on the date of taking consisted of 4,574 persons, including officers, airmen and 1,369 civilian employees. Of these, approximately 2,139 were re-

quired to live off-base in the surrounding communities, as there were not sufficient accommodations at or about the Air Base. There was a demand for housing facilities for these personnel on the date of taking (R-46, 48).

Luke Air Force Base was established during World War II (R-55), but was not declared a permanent Air Force installation until April 7, 1956 (R-47, 82). The Government housing project, for which the appellees' land was taken, was in the planning stage within several months after the Air Base was declared a permanent installation (R-128, 129). A ten-million-dollar expansion program was anticipated at the date of taking (R-87).

TRIAL THEORY OF APPELLEES

First: That the highest and best use, at present or within the reasonably near future, of the land taken was for residential housing and commercial and multiple housing on the Glendale Avenue frontage. Further, that there was a current captive market demand for those uses which commanded a market value of not less than \$1,750.00 per acre for the land taken.

Second: That *if* the Government was correct on its theory of *farm values only*, for the land taken, that the remainder farm lands of appellees would depreciate in market value not less than \$300 per acre by virtue of the taking: i.e., *severance damages*.

VERDICT

Although appellees' evidence of market value for the lands taken, on the theory of residential housing, ranged from \$269,280 to \$232,300, the verdict was for \$165,500, a far cry from a speculative verdict and indicative of a "thinking man's" jury. The *general verdict* can be accounted for on

either of appellees' theories of the case or the Government's theory of farm values only. For that matter, the jury may have adopted the Government's farm value theory at \$700 per acre for the land taken, together with the appellees' claims of severance damage to the remainder farm lands. *The Government's theory on this appeal is that the jury rendered its verdict on appellees' theory of residential values only, and that it allowed no severance damages.* That is an unwarranted and clairvoyant assumption by counsel, based on speculation only, as recognized in *Burnett v. Central Nebraska Pub. P. & I. D.*, 125 Fed. (2d) 836, 838. On Appeal, a verdict should be viewed in the light of those facts most favorable in support of the appellees' theory of the case and which tend to support and justify the verdict.

ISSUES FRAMED BY EVIDENCE

The statement by appellant, on page 6 of its brief, that the second fundamental point of contention was the use or nonuse of comparable sales in arriving at estimates of market value *is erroneous*. The true bone of contention between the experts on both sides was whether or not the other sales in the vicinity were *in fact* comparable and so similar as to be trustworthy as a basis upon which to predicate a professional opinion of market value. The Government witnesses contended that they were in fact comparable and the appellees' witnesses contended they were not. Thus, the opinion of market value of all of the witnesses, having been submitted to the jury, a factual question arose for the jury's determination as to which opinions were the most convincing, accurate and persuasive. By its verdict, the jury obviously determined either (1) that the opinions of value expressed by the appellees' witnesses McGrew, Cavanaugh and Blake were the most convincing and accu-

rate (based upon a highest and best use for housing and commercial purposes), or (2) that although the highest and best use of the land taken was for farming purposes only, the appellees had suffered considerable severance damages to their remaining farm lands, as testified to by witnesses Atha, Blake and Cavanaugh and as recognized by the Government witness Englehorn.

JUSTIFICATION FOR DENIAL OF COMPARABLE SALES INSTRUCTION

In its brief, at page 15, the Government clearly states and admits that the refused instruction on comparable sales related to the *weight* to be given to sales of comparable property *as evidence*. The instruction was refused by the District Court even though appellees made no exception thereto. WHY?

1. The Government did not introduce into evidence any independent, direct evidence of comparable sales. The only evidence offered by the Government of market value was the expert opinions of witnesses Hansen and Englehorn. Accordingly, the witnesses were permitted to testify concerning the factors upon which they based their opinion, and rightly so. 32 C.J.S., Evidence, Sec. 545, pages 292-293; *H & H Supply Co. v. United States* (10 Cir.), 194 Fed. (2d) 553, 556. *But the facts so stated did not become independent evidence. United States v. 5139.5 acres of land*, 200 Fed. (2d) 659, 662. The refused instruction expressly directs the jury to consider as the "best evidence" that which was not and could not be offered *as such* into the record.

2. The opinions of the Government experts and their testimony throughout was in sharp conflict with the experts for the appellees on the question of the reliability and weight to be given the other sales in the vicinity as true and correct guides to current market value. For the court to take sides

and instruct the jury that comparable sales were the "best evidence" would have been a COMMENT ON THE WEIGHT OF THE EVIDENCE. Although the Court may in some circumstances have that prerogative, it is purely discretionary, *Cal-Bay Corp. v. U. S.*, 169 Fed. (2d) 15, 22 (C.A. 9, 1948); and in this case, it would have been a prejudicial comment, *Hickey v. U. S.*, 208 Fed. (2d) 269, *as the weight of the evidence was, under the circumstances, purely and solely a jury question.*

Other sales, dissimilar in time, location, physical adaptability, and not comparable for cogent economic reasons, would not have been proper guides to arrive at an opinion of value. The requested instruction *begged the question* and failed to advise the jury, in a precautionary manner, that it was their province to determine the weight of the other sales testified to by the Government experts and whether the foundation and predicate of their opinions were more expertly considered than those of the landowners' witnesses.

3. The most potent reason, and that which most nearly touches the "heart" of the case at bar, which justified the refusal of the "comparable sales" instruction, was the fact that the sales relied upon by the Government experts were patently dissimilar and economically not comparable to be proper guides to value, and the use of same reflected a biased attitude with an "eyes shut" approach to the problem at hand.

Witness Hansen predicated his opinion of market value on four basic points. *First*: The sales price of the "Rubenstein property" on the southeast corner of Glendale Avenue and Litchfield Road, which took place in 1953 (R-49, 54). The court, on objection of counsel, excluded the testimony as being of no value as too remote in point of time (R-58).

Witness Englehorn also thought it too remote (R-170). *Second*: Several sales of desert land East of the property taken and South of Glendale Avenue, one-fourth mile. It was uncultivated desert land that did not front on Glendale Avenue (the arterial highway), nor did it front on Luke Air Force Base, nor did it have a developed water supply (R-82, 83). The record shows nothing which could even remotely be considered as a justification for reliance upon those sales. *Third*: The apparent failure of what he deemed an attempt to subdivide for housing purposes on Litchfield Road south of Glendale Avenue (R-51). On cross-examination and in the subsequent testimony of Mr. Englehorn and others, it was developed *without contradiction* that the owner merely platted the land into lots and attempted to sell them for housing purposes (R-59). It was not a bona fide attempt to subdivide and develop as is the common practice throughout the nation by means of platting, subdividing, installation of streets and utilities, construction of model homes, and the sale of lots with similar houses built thereon as a package unit with ready-made FHA financing. This factor also was rejected by Mr. Englehorn (R-163). Mr. Hansen admitted he did not consider the fact that this land was within the "noise clearance zone," as possibly being a factor in its failure. To top it off, the land had a wash running through it and the entire effort was prior to L.A.F.B. being declared a permanent Government installation (R-89, 90). *Fourth*: Farm lands in the Adaman District on the West side of L.A.F.B., which were selling at approximately \$600 per acre for farming purposes only, were heavily relied upon by both Mr. Hansen and Mr. Englehorn. Careful analysis of the testimony reveals that there was no arterial highway passing by, to, or through the Adaman

district. In fact, the only plausible means of access was to go through Litchfield, which was three miles south of the Air Base, west on Indian School Road, and then north to the Adaman District. Appellees have no quarrel with the values expressed for those particular lands, but insist that they were rightly "rejected out of hand" by appellees' experts simply because they did not have the *strategic* location, near the entrance to the Air Base, outside of the noise clearance zone, on an arterial highway and on the populated side of the Air Base, as did appellees' lands. They were, in effect, "south of the tracks."

Witness Englehorn predicated his opinion of market value on the sale of acreage three miles north of Luke Field Air Base on Litchfield Road in Section 4 (R-160, 161) (original transcript 333), which also is on the far side of the populated area of the valley with respect to the Air Base. But he admitted that three miles south of the Air Base there was a successfully subdivided 40-acre tract. Counsel wonders why he went north away from the populated area to make a comparison instead of south. In addition, he relied upon the Adaman District sales, to which appellees make no further comment. He expressly admitted the Adaman lands were not as well located, with a problem of accessibility as compared to the appellees' lands. Further, he admitted the possibility of the subdivision of appellees' lands in the future (R-162, 172).

Despite the flaws in the foundation of the expert opinions of Messrs. Hansen and Englehorn, THE JURY HEARD IT ALL. Little wonder, indeed, that the trial court refused to comment on the weight that the jury should give to the evidence and circumstances supporting the opinions of Hansen and Englehorn.

RESPONSE TO GOVERNMENT'S ANALYSIS OF TESTIMONY FOR APPELLEES

In the Government's "Summary of Argument" it is claimed that appellees' witnesses "relied primarily on their personal experience and familiarity with the area."

This attempt to discount the credibility of the expert opinions of witnesses McGrew, Cavanaugh and Blake is not supported by the record and is a total misstatement of fact.

Witness McGrew, a man of vast experience in the planning and use of real properties in Maricopa County, Arizona, testified that the highest and best use of the land taken was for residential and commercial purposes (R-45). His opinion was predicated upon (1) Luke Air Force Base personnel required to commute to work (R-38), (2) other developments and trends in the area (R-38, 39), (3) outside noise clearance zone (R-40), (4) developed water supply and physical adaptability (R-41), and (5) residential and commercial zoning in effect (R-43).

Witness Cavanaugh, with 38 years' experience in the field of real estate appraising, building, investment, sales and development, testified he had been familiar with the land taken since 1943 (R-97), and was of the opinion its highest and best use on the date taken or within the reasonably near future was that of a housing and multiple unit development with a commercial shopping center (R-101). His opinion was predicated upon: (1) general location and accessibility to highways (R-98); (2) location in area of potential growth (R-98); (3) size, terrain, accessibility to utilities, schools and churches (R-98); (4) strategically located near source of sales market (R-99); (5) enough land held by owners for a builder and developer to make a substantial deal (R-100); (6) commercial zoning on northwest and southwest corners of Dysert Road and Glendale Avenue

(R-100); (7) land taken most valuable holding of appellees (R-100); and (8) stability by virtue of L.A.F.B. having been declared a permanent Government facility (R-105).

Witness Blake, with thirteen years' experience as a professional appraiser, including blocks of acreage for future subdividing in Maricopa County, testified his opinion of highest and best use was for residential purposes on the rear acreage and commercial on the frontage on Glendale Avenue (R-127). His opinion was predicated on: (1) search and failure to find comparable sales in point of time, size and type in the immediate vicinity (R-123); (2) land taken was on east side of L.A.F.B. toward the area of development and not away from it (R-124); (3) physically adaptable (R-124); (4) comparison with sales of lands similarly situated on fringe of other developed area seven or eight miles away with similar demand for housing facilities (R-126); (5) zoning factor (R-127); and (6) demand for housing in the area was sufficient to affect the market value and warrant the immediate development of appellees' lands (R-128).

ARGUMENT

I. First Assignment of Error.

As stated in the Government's brief on page 15, the comparable sales instruction related "to the weight to be given to sales of comparable property *as evidence* * * *". This Court has heretofore reviewed this question in a case practically "on all fours" with the case at bar and appellees submit that it is decisive on both claimed errors on this appeal, to-wit: *U. S. v. Waterhouse*, 132 Fed. (2d) 699 (C.A. 9, 1943). There, as here, the landowners claimed a market value predicated on residential development in the future, whereas the Government contended for cane land values only by virtue of present use. The issue was whether the

landowner's evidence was admissible per se because predicated upon future use, or whether it was a jury question to determine the *weight of the probability and effect* of future use on current market value. The Court held, in construing the law of eminent domain, as set down by the leading decision of *Olson v. U. S.*, 292 U.S. 255, 54 S. Ct. 708, 78 L. Ed. 1236, that:

“* * * If there is any substantial evidence to show that the adaptability of the lands in question for the uses testified to was ‘reasonably probable,’ then the evidence was admissible, and it was for the jury to say whether *Such Adaptability Affected the Market Value of the Lands.* * * *” (Emphasis supplied.)

That there is substantial evidence in this record of a “reasonable probable effect” upon the market value by the demand for uses here contended for cannot be questioned. For example:

1. Demand for housing at or near L.A.F.B.
2. Physical adaptability.
3. Adjacent to arterial highway.
4. Outside of noise clearance zone.
5. Government witnesses recognized reasonably probable use for frontage on Glendale Avenue for purposes other than farming.
6. Successful subdivisions seven miles east, three miles south, and six miles northeast.
7. L.A.F.B. declared permanent installation.

Both physical and economic adaptability having been established to a “reasonable probability,” *it was for the jury to determine what the best and most reliable evidence of market value was* and not for the Court by the requested instruction. See also, *U. S. v. Meadow Brook Club*, 259 Fed. (2d) 41 (C.A. 2, 1958).

Though the identical comparable sales instruction was not reviewed in the *Waterhouse* appeal, the conclusion arrived at therein answers this question four-square, to-wit: WHOSE PROVINCE IS IT TO DETERMINE THE WEIGHT OF THE EVIDENCE IN DETERMINING MARKET VALUE?

PROPOSITION OF LAW NO. I

When Expert Opinion Evidence Is in Sharp Conflict as to the Degree of Similarity or the Comparability of Sales of Other Lands in the Vicinity, as Guides to Market Value, the Weight of the Evidence Is the Exclusive Province of the Jury.

Conspicuous by its absence from the Government's brief is the federal appellate decision wherein this precise "issue for decision" was presented, analyzed, and determined (favorable to appellees). *Hickey v. U. S.*, 208 Fed. (2d) 269, 273.

"The point at issue is the relative weight to be given to the recent prior sale of the property condemned and to recent sales of other, comparable property. As between the two, it is the position of the U. S. that a prior sale of the precise property condemned was, as a matter of law, entitled to more weight than sales of comparable property. * * *"

In reviewing the holdings in *Southern Scrap v. U. S.*, 113 Ct. Cl. 129, 82 Fed. Supp. 520, *Baetjer v. U. S.*, 143 Fed. (2d) 391, and *U. S. v. 13,255.53 acres*, 158 Fed. (2d) 874, the court construed them all as only lending authority to the proposition that "in some cases" the Government's principle would be correct but not as a flat rule of law. THE RULE OF THE CASE WAS:

"* * * The issue presented is peculiarly within the discretion of the trial judge in the light of the facts in each case. * * *"

In the case at bar, the trial judge exercised his discretion by refusing the "comparable sales instruction" and left it to the jury to determine the weight of the evidence upon which the various opinions were predicated.

Squarely in point in support of this proposition is *U. S. v. 679.19 acres of land, et al*, 113 Fed. Supp. 590, wherein the Government contended that the entire weight of the evidence should be placed on valuations found by its experts in that they prefaced their findings upon alleged comparable sales. The landowner's witnesses denied that the sales were comparable and, in turn, used other evidence and factors upon which to predicate their opinions of value. The issue was the *weight* to be given the testimony, and the Court held *that it was a question for the jury and relied upon the rule set forth in U. S. v. Ham*, 187 Fed. (2d) 265 (C.A. 8, 1951). It was pointed out that the jury must consider both sides and weigh the evidence and that it was "IMPROPER TO SET ASIDE A JURY VERDICT WHERE BOTH SIDES OF THE QUESTION WERE BEFORE IT," which was the precise rule adopted by *this court in Simmonds v. U. S.*, 199 Fed. (2d) 305, 307, as follows:

"The jury heard expert testimony submitted by both sides. The experts varied in their estimates from \$300 per acre to \$26,000 per acre, depending upon whether they considered the property to be best suited for commercial or residential purposes. * * * Nevertheless, the jury heard the conflicting testimony by qualified experts on both sides and reached a finding which is supported by substantial evidence. *Since the question of credibility is for the District Court and the award is within the range of the testimony, the award cannot be set aside on appeal. Porrata v. U. S.*, 1 Cir., 1947, 158 Fed. (2d) 788, 791. * * *" (Emphasis supplied.)

The *Ham* case does not stand for the proposition contended for by the Government on page 16 of its brief. In

that case, the trial judge *excluded* the Government's evidence of other sales and upon *that ground* was reversed. Having refused the evidence of other sales, the District Court refused to give an instruction that the jury should "take into account and consider what land in the neighborhood was being sold for at the time of taking." *There was no requested instruction that comparable sales were the "best evidence."* But interesting indeed was the Court's ruling concerning the *weight* of the evidence and whose province it was to try and determine the same:

"* * * To fairly try the issue and determine just compensation in this case, it was necessary for the jury to consider both sides of the dispute and to *weigh the evidence of use value which tended to enhance compensation for the taking against the evidence of the sales value which tended to diminish it, and the duty rested on the court to conduct the proceedings of the trial to obtain fair and impartial consideration of both sides.* * * *" (Emphasis supplied.)

Although the Government relies heavily upon *U. S. v. 5139.5 Acres of Land*, 200 Fed. (2d) 659 (C.A. 4, 1952), it is not decisive or persuasive of the claimed error. There again, the District Judge refused to *admit into evidence* sales of similar land upon which the Government expert predicated his opinion of market value. The judgment was reversed on *that* defect, in the rejection of the evidence, and not because of the denial of the "best evidence" instruction, to-wit:

"* * * We do not think that prejudicial error can be predicated on its refusal, however, because no evidence had been admitted of recent sales of similar parcels.
* * *"

It is true that the Court went on to say:

"If, upon the new trial which is being granted, such evidence should be introduced, such instruction would be proper. * * *"

but the instruction referred to *was not* a request that the Court instruct the jury that comparable sales were the “best evidence.” There was *no issue* of the degree of comparability of the other sales, but rather, the trial court simply refused to admit such testimony.

Persuasive and well considered authority in support of appellees’ proposition is found in *Welch v. Tennessee Valley Authority*, 108 Fed. (2d) 95 (C.A. 6, 1939), Cert. Den. 309 U. S. 688, wherein the court held that where there is a wide diversity in the testimony of different witnesses as to the value of the property in question, consideration must be given to the different theories upon which they are based:

“* * * The triers of the facts who saw and heard the witnesses were the best judges of the value, *weight* and credibility of their testimony and could best weigh the evidence. * * *” (Emphasis supplied.)

True, the court stated that sales at arm’s length of similar property are the best evidence of market value but, THE COURT WAS NOT RULING upon a rejection of such an instruction as we are dealing with here, and the facts in that case reveal that the state of the evidence was identical with that of the case at bar in that the “wide diversity” was resolved by the jury and the *judgment was affirmed*.

The Government finds comfort in and cites as authority *U. S. v. Lowrie*, 246 Fed. (2d) 472, 474 (C.A. 4, 1957), wherein the Court recognizes that:

“* * * The Court in many cases will be deprived of one of the most persuasive indications of market values and one of the most reliable checks upon expert opinion. * * *”

but *no mention is made* of the “meat of the nut” of that case, to-wit:

“* * * that an expert witness is always subject to cross examination, which may well be devastating, when it is

shown that the properties to which he refers are so dissimilar as to furnish no adequate basis for comparison. The exercise of the Court's discretion should be made with these considerations in mind. * * *"

So, here, the cross-examination of witness Hansen was "devastating" to the Government's case and thoroughly undermined the professional nature of his expressed opinion by the revelation that he failed to recognize and appreciate the effect of the "crop-dusting and noise clearance zone" problems, which doubtless would occur to any prospective purchaser of the remainder farm lands of appellees. The trial judge exercised his discretion under the directive set forth in the *Lowrie* case and permitted all of the Government's evidence to be considered by the jury, but refused to give a directive concerning these alleged comparable sales that would indicate the Court's preference to the appraisal method adopted by the Government witness. To do so could have been no more devastating to the appellees' case than a directed verdict for the Government.

The jury may deal with opinion evidence as they please, giving credence or not as their own experience or general knowledge of the subject may dictate. *The Conqueror*, 166 U.S. 110, 131, 17 Sup. Ct. 510, 518, 41 L.Ed. 937. And so an eminent domain proceeding, where the opinions of market value are conflicting with great diversity, the appellate rule is clearly stated in *U. S. v. 2.4 acres*, 138 Fed. (2d) 295, (C.A. 7, 1943) as:

"* * * Where the different theories and processes submitted by witnesses for ascertaining the value of property taken lead to widely differing results, and the opinions of the witnesses themselves are conflicting and wholly irreconcilable, and there is sufficient evidence upon which the verdict may be sustained, *the verdict will not be disturbed* unless it is manifest, from all the

circumstances in the case, that the jury adopted a false theory in arriving at their conclusion. * * *

See also *Samuelson v. Central Nebraska P.P. & I.D.*, 125 Fed. (2d) 838 (C.A. 8, 1942).

Analogous to the issue at bar is the holding in *U. S. v. Meyer*, 113 Fed. (2d) 387 (C.A. 7), that voluntary character of other sales in the vicinity went to the weight of the evidence and was a jury question.

II. Second Assignment of Error.

This requested, but denied, instruction was predicated on the assumption by counsel (1) that the Capehart housing project was "purely governmental" in that its character, scope, and size was such that it could not be undertaken by private business; (2) the project came into existence because private industry had refused to commit private funds for a housing project; (3) that the enhancement in value was created by government needs alone; and (4) that there were no severance damages to the remainder-lands of appellees caused by the *use* to which the government was going to devote the lands taken.

This entire line of reasoning is based on facts not in issue or even in the record, together with an assumption in the government's favor of facts obviously decided in appellees' favor by the jury.

The government contends that "the land must be valued in its present condition: i.e., farm land, with a probability of commercial development" and argues that appellees' witnesses appraised the land "in a status which assumed that the probability of development had reached the level of actuality." THE IDENTICAL POINT WAS RAISED AND REJECTED in *U. S. v. Waterhouse, Supra*, ON A SET OF FACTS VIRTUALLY ON ALL FOURS WITH

THOSE AT BAR. The Court quoted the Government's argument (page 702) as

"* * * that 'the prospect that agricultural land may be profitably subdivided for dwelling, business and truck garden sites, *does not make it as valuable as an existing subdivision*' * * *'" (Emphasis added.)

and recited the landowners' argument as

"that just compensation should include any enhancement in the value of the lands taken arising from the prospect that they *could* profitably be subdivided." (Emphasis added.)

In analyzing the government's argument, the court forcefully stated:

"Appellant's argument is based on the assumption that appellees' witnesses were testifying as to what price the land would sell for if subdivided. * * * The effect of that argument is that such witnesses were testifying not as to present value but as to some future value. The record gives no support to that argument, but, in fact, shows that the witnesses were testifying as to the value of the land in November, 1940. * * *"

In the case at bar, appellees' witnesses were asked, and answered, concerning the opinions of market value as of the date of taking, to-wit: March 11, 1957. They all predicated their opinions of value upon what a willing buyer would have paid a willing seller on that date and not by assuming any "future status as claimed by the government. As heretofore stated in this brief, the *Waterhouse* decision answers both the comparable sales instruction and this phase of the second assignment of error.

The government argues that the Capelhart housing project was "inadmissible" for the purpose of showing demand and market value. The proposed use of the lands taken was only incidentally referred to at the trial and not intro-

duced, contended for, or argued, as evidence of market value. *The United States Attorney himself moved the court for a jury view*, without mention of specific purpose or qualification. (R-131)

“Mr. Eubank: May the record show that the government has moved the court for a jury view of the condemned real property and the property surrounding the taking, and that counsel for the defendant had no objection. * * *”

Counsel would have the jury *look but not see*.

The government further argues, by way of rationalization, that because private industry had not constructed a housing project on the land taken, it had “refused” to accept the financial risk. The doctrine of *Boom Co. v. Patterson*, 98 U.S. 403, and *U. S. v. Chandler-Dunbar*, 229 U.S. 53, is then invoked to support the proposition “that demand cannot be shown by the government’s activities.” True, appellees’ land had not yet been developed into a housing project, but it must be remembered that L.A.F.B. was not declared a permanent installation until April 7, 1956. The record shows that shortly thereafter (R-129) the Capehart project was general knowledge in the community. Appellees did not refuse; they never had a chance to take advantage of the newly created economic stability in the area. The government beat them to it. To say that private industry could not have financed a housing project to meet the demand created by the presence of a “permanent military installation” is nothing less than ridiculous. Nor was there any evidence in the record to that effect other than the ramblings of the inexpert Mr. Hansen.

The government would deprive appellees of the “totality of possible uses” doctrine emphasized by this court in

Phillips v. U. S., 143 Fed. (2d) 1 (C.A. 9, 1957), and the benefit of the "link in the chain of proof" rule set down in *McCandless v. U. S.*, 298 U.S. 342, 346, 56 Sup. Ct. 764, 766.

PERTINENT JURY INSTRUCTIONS

The jury was carefully instructed, out of an abundance of caution, on this very point.

"* * * You are not to consider the price a tract of land would sell for under special or ordinary circumstances. * * *" (R-179)

"* * * It is not, therefore, a question of the value of the property to the defendants or a question of the *value of the property to the government.* * * *"

"* * * In applying the market value standard, no account is to be given to values for necessities peculiar to the defendant *or the government.* But consideration should be given only to such matters as would affect the ordinary willing buyer and seller in negotiating a fair price." (Emphasis added.) (R-182)

"You are not to consider any personal loss or gain to either party." (R-185)

As clearly shown above, the instruction relied upon by the government and approved by this court in *Poulson Logging Co. v. U. S.*, 160 Fed. (2d) 712, 717 (C.A. 9), was given in toto in this case.

At the close of the government's argument on page 21 of its brief, there is asserted and cited in support of the second assignment of error the leading federal decision on the law of eminent domain, *United States v. Miller*, 317 U.S. 369, 63 Sup. Ct. 276. The only new law clearly set down in that case may be paraphrased as

PROPOSITION OF LAW NO. II

A Landowner Whose Property Is Condemned Is Entitled to Any Enhancement in Value Created by a Nearby Government Project if the Lands Taken Were Not Included or Contemplated in the Original Government Project.

which is exactly *the opposite* of that claimed in the Government's brief. If the Government project creates an enhancement in value, *it must pay*, unless under the facts the exception applies.

APPELLEES CHALLENGE THE GOVERNMENT TO POINT OUT IN THE ENTIRE RECORD, DESIGNATED ON APPEAL OR NOT, ONE SCINTILLA OF EVIDENCE THAT APPELLEES' LANDS WERE "CONTEMPLATED" IN THE ORIGINAL PROJECT, to-wit: L.A.F.B.

The *Miller* and *Cors* rule of fairness is a two-edged sword which counsel has misinterpreted. In *Scott v. U. S.*, 146 Fed. (2d) 131 (C.A. 5, 1944), the applicable rule of law was extracted from the *Miller* decision and applied to resolve the identical question on a set of facts very similar to those at bar, wherein the court stated:

"* * * The question then is whether the respondents' lands were properly within the scope of the project from the time the government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them should not deprive the respondents of the value added in the meantime by the proximity of the improvement.

* * *

SEVERANCE DAMAGES

To have given the refused instruction would have constituted prejudicial, reversible error upon a ground *delicately* overlooked by the Government. All of the experts except Mr. Hansen agreed on *one thing*, to-wit: the incurrence of severance damages to appellees' remaining lands. There was a

wide diversity of opinion among the experts as to the depreciation in market value to said remaining lands by virtue of the taking. It is impossible to determine from the general verdict how much, if any, was allowed. Nevertheless, the issue was clearly framed in the pleadings (R-12) and in the evidence. *The Government's requested instructions* on severance damages were given (R-18, 19).

The evidence of severance damages was very clear and certain. Witness Englehorn, for the Government, allowed \$9,000 in his opinion of market value, which, spread over the remaining 377.6 acres, would be an average of approximately \$25.00 per acre. Witness Atha allowed \$300.00 per acre, and witness Cavanaugh \$400.00 per acre.

Vital at the trial was the issue of crop dusting the appellees' remaining farm lands. Except Mr. Hansen, all the experts agreed that to crop dust by airplane with poisonous, organic chemical sprays such as parathion, adjacent to a housing project, was an inherently dangerous undertaking. *Witness Atha*, for appellees, the state manager for J. G. Boswell Company, a 16,000-acre farming and ginning operation, and also a neighboring landowner to appellees, *Cal-Bay Corp. v. U. S., supra*, testified that good crops could not be raised without airplane crop dusting when the cotton got tall in July and August (R-145).

It does not take an expert to tell a jury that the prospective and proverbial willing buyer of appellees' remaining farm lands would heavily consider this crop dusting feature in deciding what he would be willing to pay, when there are other farm lands without the same problem. *The point is*, it was the very fact that the Government was building houses on the lands taken that created the severance damage (although the record is replete with other physical factors of damage) (R-71, 131, 147, 156, 165).

Query: How can the jury measure and assess severance damage caused by the housing project if they are instructed to disregard the use of the lands taken?

PROPOSITION OF LAW NO. III

Severance Damages Include Those Caused by the Use of the Property for the Purpose for Which the Condemnation Is Made.

Appellees submit that the overwhelming weight of authority supports this proposition of law as set forth in *Sharp v. U. S.*, 191 U.S. 341, 24 Sup. Ct. 114, 117, 48 L.Ed. 211, wherein the rule was clearly stated as :

“* * * If the remaining land had been part of the same tract which the government seeks to condemn, then the damage to the remaining portion of the tract taken, arising from the *probable use thereof by the government*, would be a proper subject of award in these condemnation proceedings, * * * ” (Emphasis supplied.)

and this court has heretofore heavily relied upon the rules governing severance damages as recited in the *Sharp* case. *Cole Investment v. U. S.*, 258 Fed. (2d) 203 (C.A. 9, 1958). Although the issue was not directly before the Supreme Court in the *Sharp* case, it was in *U. S. v. Archer*, 36 Sup. Ct. 521, 531,

“* * * It is an established rule, recognized everywhere, that where only part of a tract of land is taken, the owner is entitled not merely to the market value of the part taken, but to all damage to the remainder of his tract *proximately resulting from use made of the part actually taken*. * * * ” (Emphasis added.)

In the *Archer* case, the dictum rule of the *Sharp* case was adhered to and relied upon together with *U. S. v. Grizzard*, 219 U.S. 180, 31 Sup. Ct. 162, 55 L.Ed. 165, where the rule is stated as :

“* * * Since, therefore, there has been a taking of part of the owner's single tract and damage has resulted to the owner's remaining interest by reason of the rela-

tion between the taken part and that untaken, or by reason of the use of the taken land, the rule applied in the cases cited does not control this case. * * * The compensation to be awarded includes not only the market value of that part of the tract appropriated but the damage to the remainder resulting from that taking, *embracing, of course, injury due to the use to which the part appropriated is to be devoted.* * * *” (Emphasis added.)

This doctrine is adhered to by the able authors of Lewis, *Eminent Domain*, 3rd ed., sections 686 and 710, and Nichols on *Eminent Domain*, 3rd ed., section 14.232, page 325, 338, n. 9. See also *Bauman v. Ross*, 167 U.S. 548, 17 Sup. Ct. 966. For a circuit court decision squarely in point, see *West Virginia Pulp & P. Co. v. U. S.*, 200 Fed. (2d) 100.

The use of the land taken as a housing project has seriously jeopardized the appellees' future farming operation on their remainder lands, as crop dusting will be next to impossible. The jury was entitled to consider that factor in fixing damages; thus the instruction that the jury was not to consider the *use* being made of the land taken by the Government was justly refused.

SUMMARY AND CONCLUSION

This case was fairly tried and submitted to the jury. The verdict was reasonable and within the scope of the evidence. The court's instructions protected the rights of both the Government and the appellees with great nicety. The court exercised its discretion in permitting the jury to determine what the "best evidence" was in support of the expert opinions. Further, the court recognized "proximity value" inherent in appellees' lands and for that reason, together with the severance damage issue, permitted the jury to consider the proposed use of the lands taken as an element of damage.

The judgment reflects all elements of value which logically might be considered in determining the issue of just compensation. Both the government and appellees have had their day in court. It is respectfully submitted that no errors of law were committed by the trial court which would warrant a reversal. The judgment should be affirmed.

Respectfully submitted,

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In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT,

v.

ARTHUR E. BAKER, DORIS M. BAKER, JOHN L. ROACH
AND BETTIE JO ROACH, APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

REPLY BRIEF FOR THE UNITED STATES, APPELLANT

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16461

UNITED STATES OF AMERICA, APPELLANT,

v.

ARTHUR E. BAKER, DORIS M. BAKER, JOHN L. ROACH
AND BETTIE JO ROACH, APPELLEES

*UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA*

REPLY BRIEF FOR THE UNITED STATES, APPELLANT

I

**The Court Erred in Refusing to Instruct the Jury that
Comparable Sales Are the Best Evidence of Market Value**

The condemnees seek to justify the court's refusal of the comparable sales instruction on the grounds that the Government's testimony regarding comparable sales was insufficient to support such an instruction, and would have been an unwarranted comment on the evidence by the court. Therefore, they contend, the court was merely exercising its discretion in refusing the in-

struction. This argument confuses principles of valuation with comment on the evidence.

The charge we requested was a statement for the guidance of the jury that sales are the best evidence of value. *Carlstrom v. United States*, recently affirmed by this Court, No. 16,128, February 15, 1960, is an excellent illustration of the correct conduct of the trial. The court there instructed (pp. 2093-2096 of the record) that bona fide sales and leases of comparable properties, if such are found, made within a reasonable time before the date of valuation, are the best evidence of market value. Whether there are such comparable transactions is a question of fact for the jury.

Appellees argue at length (Br. 6-8) that the sales relied upon by the government experts were not comparable and were too remote for one reason or another. But, except for one sale, which he considered too remote in time (R. 49), the district judge admitted evidence of the sales. Whether they were comparable was for the jury. Appellees' argument thus, in fact, is a contention that the judge invaded the province of the jury, decided that the sales were not of comparable properties and therefore refused to give the requested charge. The appellees accuse the judge of contradictory actions. We do not believe this attack upon the district judge is warranted. The requested charge is a correct statement of law as to the weight to be given this *type* of evidence if the jury finds the necessary factual foundation, i.e., comparability (Opening Brief, pp. 14-17). In this regard it makes no difference in what form the evidence of sales comes in, i.e., whether as independent

evidence or as facts relied upon by the experts (cf. Br. 5). There is a vast difference between instructing the jury on the legal significance of a fact, if found, i.e., comparability, and commenting on the weight of the evidence relating to that fact. Appellees' argument falls when this distinction is recognized. Put otherwise, the instruction here requested related, not to the weight of the particular evidence, but to the weight of the general type of evidence under Fifth Amendment principles. The request thus was not, as appellees say (Br. 6), an attempted invocation of the court's discretion to comment on the evidence. Rather, it was an invocation of the court's right and duty to guide the jury as to the legal principles applicable to the facts. Once this distinction is recognized, we believe it is clear that appellees give no "justification for denial of comparable sales instructions" (Br. 5-8). We, of course, agree with appellees' "Proposition of Law No. 1" (Br. 12) (but not with their analysis of the decisions cited or of the record of the instant case thereunder). That is irrelevant, however, to the true issue of this case, which is whether the jury should be told the applicable principles of just compensation law. Under appellees' argument, any instruction giving the jury any indication of how to arrive at market value or what factors to consider would be excluded as comment on evidence relating to those factors. Clearly the jury is not to be left without such guidance.

That the requested instruction, if given, would have operated as a guide, and not as comment upon the weight of the evidence of comparability, is made per-

fectly clear when the remainder of the instructions are considered. The court instructed at length regarding the weight to be given the testimony of the experts: "It is your duty to determine whether such opinions are correct or erroneous" (R. 183). "You are the sole judges * * * of the weight that should be given to their testimony * * *" (R. 184). Then, correctly stating its position, the court said, "It is the province of the Court to declare to you the law applicable to any phase of the testimony, and it is your duty to apply that law to the testimony * * *" (R. 184). Having thus instructed the jury that they are the sole judges of the weight to be given the testimony, it would be an absurdity to presume, as do appellees, that an instruction that comparable sales are the best evidence would infringe upon that province. In the light of the overall charge, therefore, this instruction is unmistakably a correct statement of a principle of law intended to be applied by the jury to the facts as they found them, i.e., comparability, as a guide toward attainment of their ultimate goal, i.e., just compensation.

Appellees also say (Br. 10-12) that *United States v. Waterhouse*, 132 F.2d 699 (C.A. 9), is "practically 'on all fours' with the case at bar." The *Waterhouse* case is indeed a weak reed for any proposition since certiorari was granted but the case was affirmed by an equally divided court. *United States v. Waterhouse*, 321 U.S. 743. Passing that, the only similarity to this case of the *Waterhouse* case is that, like literally hundreds of other cases, value for subdivision purposes was

claimed.¹ There was no issue at all in that case as to instructions concerning comparable sales.

II

The Court Erred in Refusing to Instruct the Jury Not to Consider the Use Made of the Property by the Government After the Date of Taking

Appellees' first answer to our demonstration that this request was founded on correct law and was essential to prevent unjustified reliance merely upon the fact that the Government built the project to prove that private industry would do so, is the assertion that the *Waterhouse* case decided "THE IDENTICAL POINT" (Br. 17). No issue as to proof of a claimed higher use because the Government had used the condemned land for the purpose was involved in *Waterhouse*. If it stands for what appellees say it does, then, we submit, it is plainly erroneous. Nor do the instructions to exclude value to the Government cover this matter.

As in the first point, appellees confuse the issue in the application they seek to give the enhancement rule of *Miller, Cors* and similar cases (Br. 20-21). We agree that, since it was a preexisting project, demand created by Luke Air Force Base may be considered. But that

¹ We believe the later cases make clear the error of the *Waterhouse* case in attempting to arrive at value of undeveloped land by multiplying or adding assumed value of lots after subdividing. *United States v. Certain Parcels of Land, Etc.*, 149 F. 2d 81 (C.A. 5, 1945); *United States v. 3,544 Acres of Land, Etc.*, 147 F. 2d 596, 598 (C.A. 3, 1945); *United States v. Iriarte*, 166 F. 2d 800 (C.A. 1, 1948), cert. den. 335 U.S. 816.

circumstance may not, as appellees seek to do, be stretched to include compensation based upon a housing development which only the Government could construct. It must be remembered that the burden was on appellees to prove that there was sufficient probability of private industry constructing a housing project to fill the needs of Luke Air Force Base, not on the Government to prove the negative as appellees seemingly assume (Br. 17). Appellees seem to be saying that the burden is on the United States to prove that all enhancement because of housing potentiality could only result solely and exclusively from government military financing. The fact is that the present record shows precisely that and, while we only challenge the lack of instruction on this appeal, the valuations based on housing potentiality were inadmissible. As we have pointed out in our opening brief (pp. 3-5, 19-20), it is the very absence of private financing which forces the United States to undertake Wherry and Capehart projects and the witnesses for both parties recognized this fact. Appellees' own witness, after expressing familiarity with Wherry and Capehart projects, testified (R. 128):

Q. And do you have an opinion as to whether that type of project would be needed if it was first developed by the land owners?

A. I do not think so. I think it is obvious the only reason any development would go in there was because it was needed, and if private capital has not done it, then these various methods have been provided by law to take care of housing.

Under any view, appellees' evidence fell far short of showing that, absent Wherry Act financing, a private housing project was reasonably foreseeable, as was its burden under the *Cors* case and other cases.

The use of the land taken was not in issue so far as severance damages were concerned. This is obvious since, as appellees plainly point out, both parties agreed the former owners could not crop dust on the remaining land adjacent to the government housing project (Br. 22). But the use of the land taken was in issue as it related to proof of demand for housing. For this purpose the use of the land was inadmissible.

The objection raised by appellees does not justify complete refusal to give the instruction. At the very most, and if it were necessary at all, an instruction might have been given limiting consideration of the Government's use of the land solely to the issue of severance damages. However, it is readily apparent that, since severance damages based on the Government's use of the land were not in issue, the limitation was not necessary. Accordingly, there is no justification for the court's refusal to instruct as requested.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment below must be reversed with directions for a new trial to ascertain just compensation according to correct legal principles.

Respectfully,

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MARCH 1960

No. 16468 ✓

United States
Court of Appeals
for the Ninth Circuit

JACK A. LEMON and MARTIN de BRUIN,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Hawaii

FILED

JUL 30 1939

PAUL P. O'BRIEN, CLERK

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United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In The United States District Court
For The District of Hawaii

Cr. No. 11,279 (18 USC § 1341)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK A. LEMON and MARTIN de BRUIN,

Defendants.

INDICTMENT

Count I

The Grand Jury Charges:

That commencing on or about the 21st day of May, 1958 and continuing to on or about the 17th day of June, 1958, the Defendants Jack A. Lemon and Martin de Bruin did devise and intend to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, hereinafter and more particularly set forth, from a large class of persons then residing in the City and County of Honolulu, Territory of Hawaii, that is to say, from that class of persons who were called by telephone during the above-mentioned period in connection with an organization known as the Honolulu Customers Checkbook and particularly from the following named persons: Nancy Nozawa, Robert Enomoto, Margaret Sorrell, Lieselotte Kahoo-kele, Clayton C. Holloway, and from diverse other

persons whose names are to the Grand Jurors unknown, all of said named and unnamed being members of said class of persons hereinabove referred to, and hereinafter referred to as "persons to be defrauded", and which said scheme and artifice to defraud is more particularly described as follows, to wit:

It was part of said scheme and artifice to defraud that the said Defendants would, intended to and did carry on a business of soliciting orders for the Honolulu Customers Checkbook by the use of the telephone, from an office at the Honolulu Merchandise Mart Building, City and County of Honolulu, Territory of Hawaii, in the District of Hawaii, and within the jurisdiction of this Court, and would, intended to, and did, by means of telephone calls, solicit orders from said "persons to be defrauded" for the Honolulu Customers Checkbook, and did make delivery of the Honolulu Customers Checkbook by means of and by use of the United States Postal Service.

And it was further a part of said scheme and artifice to defraud that for the purpose of inducing said "persons to be defrauded" to order from the Defendants the Honolulu Customers Checkbook the "person to be defrauded" was called on the telephone and asked a question and it was represented that if the "person to be defrauded" answered correctly he would be entitled to receive certain merchandise and services.

And it was further a part of said scheme and artifice that for the purpose of inducing said "persons to be defrauded" to order from the said De-

fendants the Honolulu Customers Checkbook and to pay the COD postage charge upon receipt of the checkbook from the United States Postal Service that they did not inform the "persons to be defrauded" that in order to obtain certain of the merchandise and services "received" it would be necessary to purchase other merchandise, tickets, or services.

And it was further a part of said scheme and artifice to defraud for the purposes of inducing said "persons to be defrauded" to order from the said Defendants the Honolulu Customers Checkbook, that in order to secure contracts with merchants in the City and County of Honolulu the Defendants represented to the subscribing merchants that this Honolulu Customers Checkbook would be advertised on radio, television and the newspapers, and would be sold from door to door and that no mention was made of telephone solicitation, and more particularly telephone solicitation of the nature hereinabove described.

And it was further a part of said scheme and artifice to defraud for the purpose of inducing said "persons to be defrauded" to order from the said Defendants a Honolulu Customers Checkbook, and for the further purpose of inducing the "persons to be defrauded" to pay the COD postage charges on the envelopes addressed to them that the said Defendants, their agents, and employees acting on their behalf would and did by means of telephone calls make oral representations, well knowing the representations would be and were false and fraudulent when made.

That on or about the 10th day of June, 1958, at Honolulu, City and County of Honolulu, in the District of Hawaii and within the jurisdiction of this Court, in violation of § 1341, Title 18, United States Code, Jack A. Lemon and Martin de Bruin for the purpose of executing the said scheme and artifice, and attempting to do so, did place and cause to be placed in an authorized depository for mail matter a letter from the Honolulu Customers Checkbook addressed to Clayton C. Holloway, 2443-B Cleghorn Street, Honolulu, T.H., to be sent and delivered by the Post Office establishment of the United States of America.

Count II

The Grand Jury realleges the allegations contained in Count I of this Indictment, except those contained in the last paragraph thereof.

That on or about the 14th day of June, 1958, at Honolulu, City and County of Honolulu, in the District of Hawaii and within the jurisdiction of this Court, in violation of § 1341, Title 18, United States Code, Jack A. Lemon and Martin de Bruin, the identical persons named in Count I of this Indictment, for the purpose of executing the said scheme and artifice, and attempting to do so, did place and cause to be placed in an authorized depository for mail matter a letter from the Honolulu Customers Checkbook addressed to Mrs. William K. Kahookele, 35 S. Kuakini Street, Honolulu, T. H., to be sent and delivered by the Post Office establishment of the United States of America.

Count III

The Grand Jury realleges the allegations contained in Count I of this Indictment, except those contained in the last paragraph thereof.

That on or about the 16th day of June, 1958, at Honolulu, City and County of Honolulu, in the District of Hawaii and within the jurisdiction of this Court, in violation of § 1341, Title 18, United States Code, Jack A. Lemon and Martin de Bruin, the identical persons named in Counts I and II of this Indictment, for the purpose of executing the said scheme and artifice, and attempting to do so, did place and cause to be placed in an authorized depository for mail matter a letter from the Honolulu Customers Checkbook addressed to J. Nozawa, 2617 Doris, Hon., T. H., to be sent and delivered by the Post Office establishment of the United States of America.

Count IV

The Grand Jury realleges the allegations contained in Count I of this Indictment, except those contained in the last paragraph thereof.

That on or about the 16th day of June, 1958, at Honolulu, City and County of Honolulu, in the District of Hawaii and within the jurisdiction of this Court, in violation of § 1341, Title 18, United States Code, Jack A. Lemon and Martin de Bruin, the identical persons named in Counts I, II and III of this Indictment, for the purpose of executing the said scheme and artifice, and attempting to do

so, did place and cause to be placed in an authorized depository for mail matter a letter from the Honolulu Customers Checkbook addressed to Margaret Sorrell, 2721 Kapiolani Blvd., Honolulu, T. H., to be sent and delivered by the Post Office establishment of the United States of America.

Count V

The Grand Jury realleges the allegations contained in Count I of this Indictment, except those contained in the last paragraph thereof.

That on or about the 17th day of June, 1958, at Honolulu, City and County of Honolulu, in the District of Hawaii and within the jurisdiction of this Court, in violation of § 1341, Title 18, United States Code, Jack A. Lemon and Martin de Bruin, the identical persons named in Counts I, II, III and IV of this Indictment, for the purpose of executing the said scheme and artifice, and attempting to do so, did place and cause to be placed in an authorized depository for mail matter a letter from the Honolulu Customers Checkbook addressed to Robert Enomoto, 45-521 Duncan Dr., Oahu, to be sent and delivered by the Post Office establishment of the United States of America.

Dated: October 3rd, 1958, at Honolulu, Hawaii.
A True Bill.

/s/ WALTER C. LIGHT,
Foreman, Grand Jury.

/s/ LOUIS B. BLISSARD,
United States Attorney.

Presented in open Court by the Grand Jury on
October 3, 1958.

/s/ WM. F. THOMPSON, JR.

[Endorsed]: Filed October 3, 1958.

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the
above entitled cause, do hereby find the defendants,

Jack A. Lemon,

As to Count I—Guilty,

As to Count II—Guilty,

As to Count III—Guilty,

As to Count IV—Guilty,

As to Count V—Guilty, and

Martin de Bruin,

As to Count I—Guilty,

As to Count II—Guilty,

As to Count III—Guilty,

As to Count IV—Guilty,

As to Count V—Guilty,

as charged in the Indictment herein.

Dated: December 3, 1958, at Honolulu, Hawaii.

/s/ TOKANOU OISHI,

Foreman.

[Endorsed]: Filed December 3, 1958.

[Title of District Court and Cause.]

MOTION IN ARREST OF JUDGMENT

Defendants move the court to arrest the judgment in the above entitled cause for the following reason:

1. The indictment does not state facts sufficient to constitute an offense against the United States.

Dated: Honolulu, Hawaii, this 6th day of December, 1958.

/s/ HYMAN M. GREENSTEIN,
Attorney for Defendants.

[Title of District Court and Cause.]

MOTION FOR ACQUITTAL

Defendants move the court for judgment of acquittal on the ground that the evidence is insufficient to sustain a conviction.

/s/ HYMAN M. GREENSTEIN,
Attorney for Defendants.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Defendants move the court to grant them a new trial for the following reasons:

1. The court erred in not granting defendants' motion for acquittal made at the conclusion of the government's case.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. Defendants were substantially prejudiced and deprived of a fair trial in that the court erred in admitting over objection Plaintiff's Exhibit No. 6, consisting of 6 mail pouches filled with 1874 C.O.D. pieces of mail.

5. Defendants were substantially prejudiced and deprived of a fair trial in that the comments of the judge in admitting Plaintiff's Exhibit No. 6 into evidence, were improper and substantially prejudicial to the rights of the defendants.

/s/ HYMAN M. GREENSTEIN,
Attorney for Defendants.

[Endorsed]: Filed December 8, 1958.

From The Minutes of The United States District
Court For The District of Hawaii

Tuesday, December 16, 1958.

[Title of Court and Cause.]

On this day came Mr. Sanford J. Langa, Assistant United States Attorney, and also came Mr. Hyman M. Greenstein, counsel for the defendants here in, this case being called for hearing on motion for acquittal, motion in arrest of judgment, and motion for new trial.

Following a short presentation of the motions by Mr. Greenstein and without a reply by the Assistant U. S. Attorney, the motions were denied by the Court.

District Court of The United States For The
District of Hawaii Division

CR. No. 11,279

UNITED STATES OF AMERICA,

vs.

JACK A. LEMON and MARTIN de BRUIN.

JUDGMENT AND COMMITMENT

On this 19th day of January, 1959, came the attorney for the government and the defendant Martin de Bruin appeared in person and by counsel, Hyman M. Greenstein, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty, of the offenses of having devised a scheme and artifice to defraud a large class of persons then residing in the City and County of Honolulu, and to obtain money and property by means of false and fraudulent pretenses, representations and promises, well knowing the representations would be and were false and fraudulent when made, and for the purpose of executing the said scheme and artifice, and attempting to do so, caused to be placed in

an authorized depository for mail matter letters from the Honolulu Customers Checkbook addressed to various individuals, to be sent and delivered by the Post Office establishment of the U.S.A., in violation of §1341, Title 18, USC, as charged in Counts I, II, III, IV and V, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Count I—Three (3) Months and Fined Five Hundred Dollars (\$500.00).

Count II—Three (3) Months and Fined Five Hundred Dollars (\$500.00).

Count III—Three (3) Months and Fined Five Hundred Dollars (\$500.00).

Count IV—Three (3) Months and Fined Five Hundred Dollars (\$500.00).

Count V—Three (3) Months and Fined Five Hundred Dollars (\$500.00).

Sentences of imprisonment as to each of Counts I, II, III, IV and V are to run concurrently with each other.

Payment of the sum of \$500.00 on Count I will constitute the payment of the fine on each of the remaining counts.

Mittimus Stayed Until 11:00 A.M., Wednesday,
January 21, 1959.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JOHN WIIG,
United States District Judge.
/s/ THOS. P. CUMMINS,
Deputy Clerk.

District Court of The United States For The
District of Hawaii Division

CR. No. 11,279

UNITED STATES OF AMERICA,

vs.

JACK A. LEMON and MARTIN de BRUIN.

JUDGMENT AND COMMITMENT

On this 19th day of January, 1959, came the attorney for the government and the defendant Jack A. Lemon appeared in person and by counsel, Hyman M. Greenstein, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty, of the offenses of having devised a scheme and artifice to defraud a large class of persons then

residing in the City and County of Honolulu, and to obtain money and property by means of false and fraudulent pretenses, representations and promises, well knowing the representations would be and were false and fraudulent when made, and for the purpose of executing the said scheme and artifice, and attempting to do so, caused to be placed in an authorized depository for mail matter letters from the Honolulu Customers Checkbook addressed to various individuals, to be sent and delivered by the Post Office establishment of the U.S.A., in violation of § 1341, Title 18, USC, as charged in Counts I, II, III, IV and V, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Count I—Three (3) Months and Fined Five Hundred Dollars (\$500.00).

Count II—Three (3) Months and Fined Five Hundred Dollars (\$500.00).

Count III—Three (3) Months and Fined Five Hundred Dollars (\$500.00).

Count IV—Three (3) Months and Fined Five Hundred Dollars (\$500.00).

Count V—Three (3) Months and Fined Five Hundred Dollars (\$500.00).

Sentences of imprisonment as to each of Counts I, II, III, IV and V are to run concurrently with each other.

Payment of the sum of \$500.00 on Count I will constitute the payment of the fine on each of the remaining counts.

Mittimus Stayed Until 11:00 A.M., Wednesday, January 21, 1959.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JON WIIG,
United States District Judge.
/s/ THOS. P. CUMMINS,
Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellants: Jack A. Lemon, 1230 Palolo Street, Honolulu, Hawaii. Martin de Bruin, 4366 Royal Place, Honolulu, Hawaii.

Name and address of Appellants' attorney: Hyman M. Greenstein, 400 So. Beretania St., P. O. Box No. 661, Honolulu, Hawaii.

Offense: 18 U.S.C. Sec. 1341—5 counts.

Judgment and Sentence: Following a jury ver-

dict of guilty on all counts said appellants were on January 19, 1959, sentenced to 3 months imprisonment and to pay a fine of \$500.00 each on Count One; a similar sentence of imprisonment and fine on Counts 2, 3, 4 and 5, with the sentence of imprisonment on Counts 2, 3, 4 and 5 to run concurrently with Count One, and with payment of the fine under Count One to constitute payment of the fines imposed under Counts 2, 3, 4 and 5.

Appellants are on bail.

We, the above named Appellants, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated at Honolulu, Hawaii, this 23rd day of January, 1959.

/s/ HYMAN M. GREENSTEIN,
Appellants' Attorney.

HYMAN M. GREENSTEIN and
ROBERT A. FRANKLIN,
Of Counsel.

[Endorsed]: Filed January 23, 1959.

[Title of District Court and Cause.]

APPEARANCE BOND

Know All Men By These Presents:

That we Jack A. Lemon, as principal, and Rex Ravelle, as surety, are held and firmly bound unto the United States of America in the full sum of Five Thousand Dollars (\$5,000.00) for the payment

of which well and truly to be made we do bind ourselves, our executors and administrators, jointly and severally by these presents,

Whereas, Lately in the United States District Court in and for the District of Hawaii judgment and sentence were made and entered against Jack A. Lemon, one of the defendants above named, and

Whereas, notice has been given of appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit to secure a reversal of said judgment and sentence,

Now, Therefore, the condition of the above obligation is such that if the said Jack A. Lemon shall appear here in person or by attorney in the United States Circuit Court of Appeals for the Ninth Judicial Circuit on such day or days as may be appointed for the hearing of said cause in said Circuit Court and prosecute his appeal and shall abide by and obey all orders made by said Circuit Court in said Cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Circuit Court may direct, if the judgment and sentence against him shall be affirmed or the appeal dismissed; and if he shall appear for trial in said District Court on such day or days as may be appointed for a retrial of said cause and abide by and obey all the orders made by said District Court, provided the judgment and sentence made against him shall be reversed by said Circuit Court, and if he shall not depart from the Island of Oahu, Territory of Hawaii, without first obtaining the permission of the District Court, then the above

obligation shall be void, otherwise to remain in full force, effect and virtue.

In Witness Whereof, the above bounden principal and surety have hereunto affixed their hands this 23rd day of January, 1959.

/s/ JACK A. LEMON,
Principal.

/s/ REX RAVELLE,
Surety.

Taken and acknowledged before me this 23rd day of January, 1959.

[Seal] /s/ E. C. ROBINSON,
Deputy Clerk, U .S. District
Court.

Approved:

/s/ JON WIIG,
U. S. District Judge.

Territory of Hawaii,
City and County of Honolulu—ss.

Rex Ravelle, being first duly sworn on oath, deposes and says:

That he is the Rex Ravelle named as surety in the within and foregoing bond; that he resides at 965 Makaiwa Street, Honolulu, Hawaii; that the telephone number at said residence is 78535.

That he deposits herewith the sum of Five Thousand Dollars (\$5,000.00) with the Clerk of the above

entitled Court under the terms and conditions recited in the within and foregoing bond.

/s/ REX RAVELLE.

Subscribed and sworn to before me this 23rd day of January, 1959.

[Seal] /s/ E. C. ROBINSON,
Deputy Clerk, United States District Court, Territory of Hawaii.

Receipt of the said sum of Five Thousand Dollars (\$5,000.00) is hereby acknowledged.

WM. F. THOMPSON, JR.,
Clerk,
/s/ By E. C. ROBINSON,
Deputy Clerk, U. S. District
Court.

[Endorsed]: Filed January 23, 1959.

[Title of District Court and Cause.]

APPEARANCE BOND

Know All Men By These Presents:

That we Martin de Bruin, as principal, and Rex Ravelle, as surety, are held and firmly bound unto the United States of America in the full sum of Five Thousand Dollars (\$5,000.00) for the payment of which well and truly to be made we do bind ourselves, our executors and administrators, jointly and severally by these presents,

Whereas, Lately in the United States District Court in and for the District of Hawaii judgment and sentence were made and entered against Martin de Bruin, one of the defendants above named, and

Whereas, notice has been given of appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit to secure a reversal of said judgment and sentence,

Now, Therefore, the condition of the above obligation is such that if the said Martin de Bruin shall appear here in person or by attorney in the United States Circuit Court of Appeals for the Ninth Judicial Circuit on such day or days as may be appointed for the hearing of said cause in said Circuit Court and prosecute his appeal and shall abide by and obey all orders made by said Circuit Court in said Cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Circuit Court may direct, if the judgment and sentence against him shall be affirmed or the appeal dismissed; and if he shall appear for trial in said District Court on such day or days as may be appointed for a retrial of said cause and abide by and obey all the orders made by said District Court, provided the judgment and sentence made against him shall be reversed by said Circuit Court, and if he shall not depart from the Island of Oahu, Territory of Hawaii, without first obtaining the permission of the District Court, then the above obligation shall be void, otherwise to remain in full force, effect and virtue.

In Witness Whereof, the above bounden principal and surety have hereunto affixed their hands this 23rd day of January, 1959.

/s/ MARTIN de BRUIN,
Principal.
/s/ REX RAVELLE,
Surety.

Taken and acknowledged before me this 23rd day of January, 1959.

[Seal] /s/ E. C. ROBINSON,
Deputy Clerk, U. S. District
Court.

Approved:

/s/ JON WIIG,
U. S. District Judge.

Territory of Hawaii,
City and County of Honolulu—ss.

Rex Ravelle, being first duly sworn on oath, deposes and says:

That he is the Rex Ravelle named as surety in the within and foregoing bond; that he resides at 965 Makaiwa Street, Honolulu, Hawaii; that the telephone number at said residence is 78535.

That he deposits herewith the sum of Five Thousand Dollars (\$5,000.00) with the Clerk of the above entitled Court under the terms and conditions recited in the within and foregoing bond.

/s/ REX RAVELLE.

Subscribed and sworn to before me this 23rd day of January, 1959.

[Seal] /s/ E. C. ROBINSON,
Deputy Clerk, United States District Court, Terri-
tory of Hawaii.

Receipt of the said sum of Five Thousand Dol-
lars (\$5,000.00) is hereby acknowledged.

WM. F. THOMPSON, JR.,
Clerk,
/s/ By E. C. ROBINSON,
Deputy Clerk, U. S. District
Court.

[Endorsed]: Filed January 23, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, William F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from Page 1 to Page 212 consists of a statement of the names and addresses of the attorneys of record and of the various pleadings, exhibits, and transcript of proceedings as hereinbelow listed and indicated:

Indictment.

Verdict.

Motion in Arrest of Judgment, Motion for Acquittal, Motion for New Trial, Memorandum of Points and Authorities in Support of Motions, Notice of Motion.

Judgment and Commitment, Martin de Bruin.

Judgment and Commitment, Jack A. Lemon.

Notice of Appeal.

Appearance Bond, Jack A. Lemon.

Appearance Bond, Martin de Bruin.

Order Enlarging Time.

Designation of the Contents of the Record on Appeal.

Transcript of Proceedings.

Plaintiff's Exhibits Nos. 1, 2, 4, 5, 5-B, 7, 8, 9, and 10 and Defendants' Exhibits "A," "B," "C," "D," "E," "F-1," "F-2," "G," "H-1," "H-2," "I-1" through "I-8," "J-1," "J-2," "K," "L," "M," and "N" (in separate envelope).

I further certify that included herein is a copy of the Minutes of this Court of December 16, 1958.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 7th day of May, 1959.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk.

In The United States District Court For
The District of Hawaii

Criminal No. 11,279

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK A. LEMON and MARTIN de BRUIN,

Defendants.

REPORTER'S TRANSCRIPT

In the above-entitled matter, held in the U. S. District Court, Honolulu, T. H., on December 1, 2 and 3, 1958,

Before Hon. Jon Wiig, Judge and a Jury.

Appearances: S. J. Langa, Esq., appearing for the Plaintiff. Hyman M. Greenstein, Esq., appearing for the Defendants. [1]*

Proceedings

Honolulu, T. H., December 1, 1958 at 10:00 a.m.

(Case called by the Clerk.)

(A jury was duly impaneled and sworn to try the case.)

(Recess.)

The Court: The record will show the jury is present, the Defendants and their counsel. Before you proceed, Mr. Langa, ladies and gentlemen of the jury, I instruct you to absolutely disregard any

* Page numbers appearing at top of page of Reporter's Transcript of Record.

of the answers given by any of the other jurors when I was examining you as to your qualifications to sit on this jury panel. I think you understand what I mean.

You may proceed.

Mr. Langa: The indictment in this case is fairly detailed, and I think anything I would say by way of opening statement would be repetitious. I think I will waive the opening statement.

The Court: I didn't mean to take away your privilege, but I felt in view of the length of the indictment that I should read the first count.

Mr. Langa: I don't mean to imply anything, but I think that in view of the fact the indictment is so detailed, it seems hardly necessary for me to make an opening statement.

The Court: Mr. Greenstein, do you wish to make an opening statement now? [2]

Mr. Greenstein: We will also waive opening remarks, your Honor.

The Court: Very well. Will you call your first witness?

Mr. Langa: Mrs. Arkin.

RAMONA ARKIN

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Langa): Mrs. Arkin, will you please state your name and occupation for the record?

(Testimony of Ramona Arkin.)

A. Yes. Mrs. Ramona Arkin. I am manager of the Stauffer Salon.

The Court: You will have to keep your voice up so that everyone can hear you. If at any time any juror can't hear a witness, raise your hand or shout out, because it is absolutely necessary that you hear every word of testimony in this trial.

Q. (By Mr. Langa): Will you please answer the question again and keep your voice up?

A. Mrs. Ramona Arkin, manager of the Stauffer Salon.

The Court: Will you spell the last name?

A. A-r-k-i-n.

Q. (By Mr. Langa): Were you manager of the Stauffer Salon in June of this year? [3]

A. No, I was not.

Q. Were you employed there at that time?

A. Yes, I was.

Q. Can you outline for the Court, just briefly in your own words, the services that the Stauffer Salon provides for the public?

A. Yes. We are a slenderizing salon.

Q. And are your services available to both men and women? A. No, for ladies only.

Q. And what is your policy with regard to women who come into your salon interested in a figure analysis or trial lesson?

A. We offer a free trial, one free trial and a figure analysis to anyone who wants to come in, to give them a chance to try it out. At that time we weigh and measure them and see about how

(Testimony of Ramona Arkin.)

much they have to come down, and we can tell how long it will take to get them there.

Q. Now, do you know Mr. Jack Lemon or Martin de Bruin?

A. No, I do not, although I believe I have seen them before.

Q. At the Stauffer Salon? A. Yes, sir.

Mr. Langa: Thank you. No further questions.

Cross Examination

Q. (By Mr. Greenstein): Well, now do you know whether or not the company with which you are associated participated in the coupon business of the Honolulu Customers Checkbook?

Mr. Langa: Objection, your Honor. This is beyond the scope of the direct examination, and I think that if he wants to call the witness, he can in the due course. But at this time this sort of question is more properly direct examination.

The Court: I think Mr. Langa is right.

Mr. Greenstein: I think he is technically right, but to save time, your Honor, it appears there are several witnesses in the same category, we would respectfully request that we be permitted to designate them as our witness in the interest of saving time, so the people won't have to go and be called again. There are about ten or twelve witnesses who, in effect, will be witnesses for both sides.

The Court: Well, how far would you propose to examine this witness? The government should put on its case first and then the Defendants.

(Testimony of Ramona Arkin.)

Mr. Greenstein: That is true. I have never talked with this particular witness. I can't tell whether this would be a lengthy examination or not.

The Court: Then I am going to ask you to confine your cross examination to the direct examination. [5]

Q. (By Mr. Greenstein): Well, do you know anything about the Stauffer System signing up with Honolulu Customers Checkbook? May I just ask that one question?

Mr. Langa: This is, in effect, your Honor, the same question that was asked previously and is not a proper question.

The Court: I will allow her to answer yes or no, and that will be as far as you can go in this line.

Mr. Greenstein: May I withdraw the question? I move that all the witness' testimony be stricken as pending neither to prove or disprove any of the issues in this case.

The Court: Yes. The motion is denied. I assume that the government will tie it in. You may renew your motion at a later time.

Mr. Greenstein: May we have an answer to the one question?

The Court: Will you read the question?

(The last question was read by the reporter.)

The Witness: No.

Q. (By Mr. Greenstein): What is the cost of the treatment that your company gives?

Mr. Langa: Your Honor, this, again, is not within the scope of the direct examination.

(Testimony of Ramona Arkin.)

The Court: Well, it is permissible to a certain extent, because the witness has testified about one free [6] treatment and a figure analysis. However, here again, I will not allow extensive cross examination. Do you understand the question?

The Witness: I don't know.

The Court: Read the question.

(Question read by the reporter.)

The Witness: We have various rates. One treatment would be \$3.50.

Q. (By Mr. Greenstein): Your course of treatment, would you tell us something about your course of treatment as to general cost?

Mr. Langa: Your Honor, again this is going beyond the scope of the direct examination.

Mr. Greenstein: May I respectfully submit that the door was opened by eliciting from this witness the fact that they do, or have given or do give one free treatment.

The Court: I will allow the question.

The Witness: In a series of treatments our rates would range anywhere from two to \$3 in a series over 30.

Q. (By Mr. Greenstein): A series over how many treatments? A. 30.

Q. Who was manager at the time, in June of this year? A. Virginia Hilliard.

Q. Is she still in the Territory? [7]

A. No, she is not.

Mr. Greenstein: I have no further question.

The Court: Redirect?

Mr. Langa: No questions.

The Court: You are excused Mrs. Arkin.

Mr. Langa: Mr. George Oka.

GEORGE OKA

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Langa): Would you please state your name and occupation?

A. My name is George Oka. I am owner and operator of the George Service, a Shell Service Station.

Q. Mr. Oka, have you ever met Jack Lemon or Martin de Bruin? A. Yes, sir, I have.

Q. Are either of them or both of them in this room now.

A. Yes, right there. (Indicating.)

Mr. Greenstein: We will stipulate to the identification, your Honor.

The Court: Very well.

Mr. Langa: Thank you.

Q. Have you ever had any dealings with these men or—strike that. [8]

Has either of these men ever approached you with a plan for an advertising scheme involving coupons?

A. Yes, they have.

Q. Tell us just generally, overall, the means by which they told you they would promote the scheme?

(Testimony of George Oka.)

A. Well, as far as I can remember, it was back in May, I think, Mr. de Bruin and Mr. Lemon came into my service station and told me that they had a promotion where we could acquire new customers. And they had a sample card with them showing how the coupons will work. It was not exactly a coupon. It was just a card, itself. And with that understanding, that they will go out and sell these cards, well, I signed a contract with them.

Q. What method were they going to use to sell the cards?

A. Well, when I talked to them at that time they were supposed to go out and sell them either house to house or——

Q. In any particular area?

A. Well, actually, it was supposed to be in the McCully area where my service station is located.

Q. You say in the McCully area?

A. Yes. Not exactly in the McCully area, but the area which is adjacent to my service station.

Q. In the vicinity of your service station? [9]

A. That is right.

Q. Mr. Oka, I show you a typewritten sheet of paper on yellow paper. Can you identify that?

A. Yes, I could.

Q. Can you tell us what it is?

A. Well, this is what you may call it, a transcript, when they had first promoted my promotion, and these are the exact words which they used over the telephone to sell the cards.

(Testimony of George Oka.)

Q. I see. Where did you first see that piece of paper?

A. When I went up to their office. I forget what the room number was, but up in the Merchandise Mart Building, where they had anywhere from half a dozen to one dozen girls on the telephone, call up various people all over town. And I went in there one day because I didn't like the way it was being promoted. And I had lots of complaints coming in, and I went up there. I asked the girl for a copy of the transcript that they were calling and they gave me this.

Q. So you obtained that at the office of Lemon and de Bruin? A. That is right, sir.

Mr. Langa: Your Honor, I offer this in evidence.

Mr. Greenstein: To which we have no objection.

The Court: It will be received as exhibit number 1.

The Clerk: Plaintiff's exhibit number 1. [10]

(The document referred to was marked Plaintiff's exhibit number 1 and received in evidence.)

Q. (By Mr. Langa): Mr. Oka, were you asked to bring anything with you today?

A. Yes, a copy of my contract.

Q. And do you have it?

A. Yes, I have it here. I also have this cancellation of the contract.

Q. Down at the bottom I see two signatures. Can you tell me whose signatures those are?

(Testimony of George Oka.)

A. One is Martin de Bruin and the other one is mine.

Q. You called it a contract. This is the contract with the Defendants in regard to that promotion which you have talked about? A. Yes, sir.

Mr. Langa: Your Honor, may I offer that?

Mr. Greenstein: May I see it first? I have no objections.

The Court: It will be received as exhibit number 2.

(The document referred to was marked Plaintiff's exhibit number 2 and received in evidence.)

The Court: May I suggest, Mr. Langa, that this might be read to the jury and save time. There is no mystery about it. [11]

Mr. Langa: Oh, yes, I would be happy to do that, your Honor. Exhibit 1, which was identified as the transcript which Mr. Oka obtained at the office, it says at the top in handwriting, "Merchandise Mart, 203," and in typewriting, "Do not take orders from children. For call back give this telephone number—68079.

"Hello, this is telephone number" and a space.

"This is George's Shell Service calling and I have some wonderful news for you.

"If you can answer the following question correctly you will have the opportunity to receive a George's Shell Service card worth over \$50 in useful car service.

"Are you ready for your question?

(Testimony of George Oka.)

“One. What is the largest island of the Hawaiian chain.

“Answer. Island of Hawaii.

“If missed, you say, ‘I’m sorry, the answer is the Island of Hawaii, but since you tried so hard we will give you another question.’

“2. In which hand does the Statute of Liberty hold the torch.

“Answer. Right.

“Well congratulations. Now you will receive the following:

“75 free gallons of gas, 2 free grease jobs, free [12] car wash, free flat tire repair, free battery charge, free brake adjustment, free tire rotation, free wheel bearing packed, free radiator flush.

“Your points cleaned and set and many other valuable services for your car. Now, these are only a few of the many wonderful values offered by George’s Shell Service who has gone to a great expense in order to acquaint you with his station.

“The only cost to you is \$3.95 for printing and handling cost of this service card, in all you do receive over \$50 in useful values. These cards are limited to one per family, and they will be delivered by your mail man C.O.D.

“Do I have the right address, Mrs.—read name and address out of phone book.

“Now, your card will be delivered to you tomorrow. You understand when your mail man brings your George’s Shell Service card you pay him only \$3.95. George’s Shell wants and respects your pa-

(Testimony of George Oka.)

tronage and we wish you a good time, so take advantage of these wonderful offers on your service card.

“Thank you and goodbye.”

Q. Mr. Oka, did any of your employees ever read that script on the telephone? A. No.

Q. Did you ever authorize anybody to read that script on the telephone? [13]

A. No, I haven't.

Mr. Langa: No further questions.

Cross Examination

Q. (By Mr. Greenstein): In connection with your signing a contract with the Honolulu Customers Checkbook, sir, was there an agreement as to the format of the card or coupon that would be used in the solicitation of these orders or services?

A. You mean a sample of the card?

Q. Yes. A. Yes.

Q. Do you have that sample with you?

A. Yes.

Q. Will you kindly produce it?

(The witness produces document.)

Q. I see there is some handwriting on this card. Do I assume that this has your signature and Mr. de Bruin's initials on the card?

A. Yes, and Mr. Lemon. That signature there was in verification of the cancellation of our contract.

Q. Verification of the cancellation?

A. Yes. In other words, the understanding is

(Testimony of George Oka.)

that we are—George's Shell Service is honoring the cards that were already sold.

Q. Well, we will come to that in a little while.
[14] Was not this card or a similar card agreed to by you in connection with your first signing up with Honolulu Customers Checkbook? A. Yes.

Q. Is that correct?

A. You mean if we agreed to that?

Q. Yes. A. Yes.

Q. In other words, you agreed to a sales promotion with the representatives of Honolulu Customers Checkbook, did you not; you agreed to participate with them?

A. Well, not participate in the promotion itself, but just to honor that card.

Q. To the extent that your establishment would issue or acknowledge cards and honor them, you participated with them, did you not?

A. Well, when you say participation——

Q. I will withdraw the question and reframe it. At the time you signed the contract which is in evidence as Plaintiff's exhibit number 1, I believe, did you have in mind the services that would be offered in your name? A. Yes.

Q. Did you go over this card before there was any release of any solicitations in your behalf?

A. You mean if I checked it over first?

Q. Yes. A. Yes. [15]

Q. Now, isn't it fair to say that the primary purpose of your permitting this card to be used

(Testimony of George Oka.)

was to promote new business and new customers; isn't that right? A. That is correct.

Q. Did either Mr. Lemon or Mr. de Bruin tell you how they would seek to get customers for you?

A. Well, when I first signed the contract with them, I definitely asked them that, if they were going out selling house to house, that was my understanding, that they were going out and explain to the customers how these cards worked. And as far as using the telephone to sell these cards, I was unaware of until the customers begin coming in and telling me about it.

Q. Well, would it have made any difference in your mind if you had been told that they would have used the telephone?

A. Oh, yes, definitely.

Q. You were interested in getting new customers into your station, were you not?

A. Yes, but not at the expense of, you might say, misinterpreting the card itself.

Q. Misinterpreting the card itself?

A. Yes.

Q. Well, let's get it in evidence to find out if it [16] is misinterpreted. May we offer this in evidence?

The Court: Yes. It will be received as Defendants' exhibit A.

(The document referred to was received as Defendants' exhibit A in evidence.)

Mr. Greenstein: May I first read into evidence what is an exhibit of the Plaintiff?

(Testimony of George Oka.)

The Court: You may read it to the jury.

Mr. Greenstein: Plaintiff's exhibit number 2.

"Agreement. This agreement made by and between the Honolulu Customers Checkbook and the advertiser George's Shell Service in Honolulu Customers Checkbook service card for Honolulu, Hawaii, and in consideration of the mutual promises herein contained made by one to the other, Honolulu Customers Checkbook agrees to pay all of the advertising costs on radio, T.V. and newspapers, and the advertiser pays no costs except that he agrees and promises to honor coupons in the passbook (Service card).

"Advertiser agrees to honor 3,000 coupons which will read as sample attached, except gas 5 gallons free with each 30 gallons." A pencil notation "48."

"Cards expire"—I can't tell whether it is 4 or 3 months from date of sale.

Q. Now, may I first show you this exhibit for your inspection and ask you whether the phraseology "Service card" [17] that appears on that refers to this card which is in my hand and which is Defendant's exhibit A?

A. That is right.

Q. So, at the time you entered into an agreement with the Honolulu Customers Checkbook organization you had committed yourself to honor 3,000 of these cards, had you not?

A. That is right.

Q. What was the value of the services that were

(Testimony of George Oka.)

offered in the card which is represented in evidence as Defendants' exhibit A?

Mr. Langa: Your Honor, this again, is going beyond the scope of the direct examination. Previously, we have dealing with the circumstances, formation of the contract, which was in the direct examination, but now we are getting into the matter of affirmative defense.

Mr. Greenstein: I respectfully submit, your Honor, the door was opened.

The Court: Just a minute. The objection is overruled.

Mr. Greenstein: Thank you.

Q. What was the value of the services honored by the card?

A. When you say "Value of the card," do you mean if they had taken full advantage of everything which is on the card? [18]

Q. Let's put it this way. I will withdraw it. I show you this card for your inspection and ask you to tell the Court and jury whether or not this card reads under your name, George's Service Station, "Congratulations. This is your Shell Service Card worth over \$50 in free passenger car services"; isn't that so indicated?

A. That is right.

Q. Now, as a matter of fact, this particular sales copy that you brought into Court this morning, that was discontinued after a couple of days, was it not? A. That is right.

(Testimony of George Oka.)

Q. I beg your pardon? A. That is right.

Q. By mutual agreement of the parties?

A. That is right.

Q. And you went to them, you begged off on this contract, didn't you?

A. I did not beg off, actually, coming down to it. I was dissatisfied with the way the promotion was going, so I consulted my attorney and we talked it over with Mr. Lemon and Mr. de Bruin and we mutually agreed to cancel it.

Q. In other words, you indicated to the Defendants that you were unhappy with the situation; right?

A. Yes, the way the cards had been promoted.

Q. And as a result of conferences there was a mutual [19] understanding to cancel this contract, is that it? A. That is right.

Q. Now, at the time you signed the contract you intended to honor all coupons or cards, did you not?

A. That is right.

Q. And at the time of the cancellation of the contract I believe you agreed to honor whatever cards might be outstanding?

A. That is right.

Mr. Greenstein: I have no further questions.

Mr. Langa: I have no further questions.

The Court: You are excused, Mr. Oka.

Mr. Langa: Mr. Thomas Date.

THOMAS DATE

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Langa): Would you please state your name and occupation?

A. I am Thomas Date. I am running Date's Service Station.

The Court: Will you spell that last name?

The Witness: D-a-t-e.

Q. (By Mr. Langa): Mr. Date, have you ever met the Defendants in this case?

A. Mr.—which is—— [20]

Q. Mr. Lemon and Mr. de Bruin? A. No.

Q. Have you ever met any representative of the Honolulu Customers Checkbook?

A. Yes, sir.

Q. Have you ever signed any contract with the Honolulu Customers Checkbook? A. No, sir.

Q. Has anyone ever come into your service station with cards from the Honolulu Customers Checkbook for redemption? A. Yes.

Q. Do you have a copy of that card with you?

A. Yes, I do.

(The witness produces document.)

Q. You don't have the card? A. No.

Q. Would you tell me what this document is which you have produced?

A. This document is for a contract to be signed after it is OK'd by the B.B.B. We went to find out

(Testimony of Thomas Date.)

if this will pass through the B.B.B., then I will sign it.

Q. I see. Who wrote this?

A. I think the name is on the — signed Mr. Conley.

Q. This is, then, the proposed contract with the Honolulu Customers Checkbook—— [21]

A. Yes.

Q. ——which you were asked to sign?

A. That is right.

Q. And is this his signature on the bottom?

A. Yes, that is his signature.

Mr. Langa: Your Honor, I offer this—oh, excuse me. (Handing document to counsel.)

Mr. Greenstein: Well, in view of the prior testimony, your Honor, I am first going to move to strike all of the witness's testimony on the ground that the testimony does not relate to matters which are set forth in this particular indictment, inviting the Court's attention to the fact that we have prior hereto moved both for a bill of particulars and to strike certain surplusage, which was denied, and respectfully point out that the testimony elicited from the witness prior to the signing of this particular proposed contract goes beyond the matter referred in the allegations of the indictment.

The Court: For one thing, no time element has been established here with regard to any contract, which is necessary, Mr. Langa.

Mr. Langa: I may have overlooked that, your

(Testimony of Thomas Date.)

Honor. We can establish the time easily enough. Shall I proceed?

The Court: The only thing before the Court is the offer of that document in evidence. [22]

Mr. Greenstein: Well, with respect to the offer in evidence we will move that there is not sufficient foundation laid.

The Court: The objection is sustained.

Q. (By Mr. Langa): Do you remember when it was that Mr. Conley came to you?

A. I can't remember.

Q. Well, do you remember approximately; was it this year? A. Yes.

Q. Several months ago?

A. I would say between May or June.

Q. May or June. Your Honor, that is the period of the indictment.

Did he say anything about how the cards would be distributed?

A. Yes.

Q. What did he say?

A. Well, they will be distributed from house to house. He didn't say by mail or anything, but he said contact by house to house, not by telephone calls.

Q. In any particular area? I mean in any special place?

A. Well, he said it will be all around, because they wouldn't be just our station. It will be around, to distribute [23] this type of business. It will be all kinds of business. It will be all around.

(Testimony of Thomas Date.)

Q. But it would be by house to house sales?

A. Yes, that is right.

Mr. Langa: Your Honor, I think that the foundation has been established as to the date and as to a representative of the business involved having approached him with a similar proposition as the other witnesses have been approached.

The Court: I have not seen the document you are offering. Is it comparable to the one that is in evidence?

Mr. Greenstein: Well, I am going to object.

The Court: Just one moment.

Mr. Greenstein: I think your Honor should see it. I respectfully call the Court's attention to this one fact.

The Court: Just one moment. I don't think there is sufficient foundation laid at this time. The objection is sustained.

Mr. Langa: Then, your Honor, may we have it marked for identification?

The Court: Yes, it will be marked exhibit 3 for identification.

(The document referred to was received as Plaintiff's exhibit 3 for identification.)

Q. (By Mr. Langa): Mr. Date, subsequent to the time you received that, when you spoke to Mr. Conley, did anyone [24] appear at your service station with cards to be redeemed?

A. No, I didn't have anybody. But we have a telephone call from Honolulu asking if we are dis-

(Testimony of Thomas Date.)

tributing the cards. And I said, "We are not ready yet because the contract is not——"

Mr. Greenstein: May I move to strike the last part of that answer as being not responsive to the question.

The Court: The motion to strike is denied.

Q. (By Mr. Langa): Did any of your customers ask you about the cards? A. No, sir.

Mr. Greenstein: I am going to——

The Court: What was the answer?

(Record read.)

Mr. Greenstein: Oh.

Mr. Langa: I have no further questions.

Mr. Greenstein: No questions.

The Court: You may step down, Mr. Date.

RAYMOND Y. MURAMOTO

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q .(By Mr. Langa): Please tell us your name and occupation?

A. My name is Raymond Y. Muramoto, operating Ray's Shell Service. [25]

Q. Have you ever met Mr. Lemon or Mr. de Bruin? A. I met Mr. de Bruin.

Q. And has he ever approached you with a plan involving the Honolulu Customers Checkbook?

A. Yes, he did.

Q. Did he explain his plan to you?

(Testimony of Raymond Y. Muramoto.)

A. Yes.

Q. Briefly, could you tell us how he represented to you that he would promote the plan?

Mr. Greenstein: Pardon me. Who are you referring to?

Mr. Langa: Mr. de Bruin, he said he talked to.

The Court: What was the question?

Q. (By Mr. Langa): Did Mr. de Bruin explain to you how he would promote the Honolulu Customers Checkbook?

A. Yes. As far as I heard, he was going to televise it and on the radio. That is all I heard. And he didn't say anything about house to house or anything like that.

Q. Did he say anything about——

A. About selling it house to house?

Q. Did he say anything about selling it, the Customers Checkbook, on the telephone?

A. No.

Q. Television and radio? A. Yes. [26]

Q. Newspapers? A. Yes.

Mr. Langa: I have no further questions.

Cross Examination

Q. (By Mr. Greenstein): Did you or did you not sign an agreement with Honolulu Customers Checkbook? A. Yes, I did.

Q. You agreed to honor how many coupons or cards?

Mr. Langa: Your Honor, this is going beyond the scope of direct examination.

(Testimony of Raymond Y. Muramoto.)

The Court: Objection overruled.

Q. (By Mr. Greenstein): How many coupons or cards——

A. In the card it says 10,000.

Q. 10,000? A. That is right.

Q. In other words, you were interested in getting 10,000 new customers in your station, were you not? A. Yes.

Q. By the way, did you bring your copy of the contract with you? A. Yes, I did.

Q. Is there a card attached to it of the services that were to be given?

A. No, I didn't bring that card with me. I just brought the contract with me. [27]

Q. May I see it, please?

(The witness produces document.)

Mr. Greenstein: Offer it in evidence.

The Court: There being no objection, it will be received as exhibit B.

(The document referred to was received in evidence as Defendants' exhibit B.)

Mr. Greenstein: May I have this card marked for identification?

The Court: Yes, it will be marked exhibit C for identification.

(The document referred to was received as Defendants' exhibit C for identification.)

Q. (By Mr. Greenstein): Mr. Muramoto, I will show you what has been marked Defendants' ex-

(Testimony of Raymond Y. Muramoto.)

hibit C for identification and ask you whether or not that card bearing the name Ray's Shell Service refers to your organization? A. Yes.

Q. And were those cards the cards that you agreed to offer 10,000 of? A. Yes.

Mr. Greenstein: Offer that in evidence.

Mr. Langa: No objection, your Honor.

The Court: It will be received as Defendants' exhibit C. [28]

(The document referred to was received in evidence as Defendants' exhibit C.)

Mr. Greenstein: No further questions.

Redirect Examination

Q. (By Mr. Langa): Mr. Muramoto, did you sign this contract in reliance upon the representations made to you by the Defendants which you have already testified to? A. Yes.

Mr. Langa: No further questions.

Recross Examination

Q. (By Mr. Greenstein): You signed the contract to get 10,000 prospective customers, didn't you? A. Yes.

Mr. Greenstein: No further questions.

Mr. Langa: No further questions.

The Court: You may step down, Mr. Muramoto.

Mr. Langa: Mrs. Studebaker.

GRACE STUDEBAKER

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Langa): Please state your name and occupation?

A. Grace Studebaker. I am manager of the Arthur Murray Studio, Waikiki.

Q. The dancing studio? A. Yes.

Q. Have you ever met either Mr. Lemon or Mr. de Bruin?

A. Yes, I have met both of them.

Q. Are they in this room?

A. Yes, the two of—

Mr. Greenstein: Stipulate to the identification.

Q. (By Mr. Langa): Has either or both of these men ever approached you with a promotion plan involving the Honolulu Customers Checkbook?

A. Yes.

Q. Did they make any representations to you as to the method by which the Honolulu Customers Checkbook would be promoted?

A. Yes, they did.

Q. What did they say?

A. I did question how they would promote this, and they said, well, it would be general advertising, T.V. and so forth, in a very general manner.

Q. And in reliance upon that representation did you enter into an agreement with them?

A. Yes, I did. [30]

(Testimony of Grace Studebaker.)

Q. An agreement involving the Honolulu Customers Checkbook? A. Yes.

Q. And this was about when, if you recall?

A. It was the beginning of the summer, but I can't tell you the exact month.

Q. Now, what is the general policy of Arthur Murray's Studio in regard to introductory lessons for new students?

A. Anyone who comes into the Studio gets a half-hour free lesson, dance analysis.

Mr. Langa: I have no further questions.

Mr. Greenstein: May I have this marked for identification?

The Court: Defendants' D for identification.

(The document referred to was received as Defendants' exhibit D for identification.)

Cross Examination

Q. (By Mr. Greenstein): May I show you what has been marked as Defendants' exhibit D for identification, and ask you if it bears your signature?

A. This does.

Q. And the signature of Mr. de Bruin?

A. That is right.

Q. And this calls for the Arthur Murray School [31] of Dancing obligating itself to honor 5,000 coupons? A. Yes.

Mr. Greenstein: Offer it in evidence.

Mr. Langa: Your Honor, I object at this time, inasmuch as it is not related to the direct examination. Later in the proceedings it may be proper,

(Testimony of Grace Studebaker.)

but it is not within the scope of the direct examination.

The Court: You asked the witness, Mr. Langa, if they entered into an agreement on direct examination, and here is the agreement. The objection is overruled. The document will be received as Defendants' exhibit D.

(The document referred to was received as Defendants' exhibit D in evidence.)

Q. (By Mr. Greenstein): Now, didn't they tell you they would use telephone solicitation?

A. No, they did not.

Q. Are you sure about that?

A. Yes, I am.

Q. Did you care what method of solicitation was used?

A. If it were telephone, yes, because I have my own telephone room.

Q. You do your own telephone solicitation?

A. Yes, that is right.

Q. In connection with offering free——

A. That is true. [32]

Q. Well, would it make any difference if they used newspapers or T.V.? A. No.

Q. Were any coupons ever presented to your establishment?

A. Yes, they did bring a sample booklet.

Mr. Greenstein: May I have this page marked for identification.

The Clerk: Defendants' E for identification.

(Testimony of Grace Studebaker.)

(Document referred to was received as Defendants' E for identification.)

Q. (By Mr. Greenstein): Showing you what has been marked for identification as Defendants' exhibit E, I will ask you if this is the coupon we have referred to in your testimony? A. Yes.

Q. And was that sample agreed upon at the time of the signing of the agreement with them?

A. They brought this to me later and I agreed that it was all right.

Q. In other words, you approved of this particular coupon? A. Yes, I did.

Mr. Greenstein: No further questions.

Mr. Langa: No questions. [33]

The Court: You are excused.

AL KARASICK

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Langa): Would you please state your name and occupation?

A. Al Karasick, Sports Promoter, manager, Civic Auditorium.

Q. Do you know Mr. Lemon or Mr. de Bruin?

A. I met Mr. Lemon three times.

Q. Is he here?

Mr. Greenstein: We will stipulate to the identification.

The Court: Very well.

(Testimony of Al Karasick.)

Q. (By Mr. Langa): Has Mr. Lemon ever approached you with a plan for promotion of the Honolulu Customers Checkbook? A. Yes.

Q. Did he explain his plan to you?

A. Yes, sir.

Q. Did he advise you that it was part of his plan to sell the Customers Checkbook by telephone solicitation?

Mr. Greenstein: I object to that as being leading and suggestive.

The Court: Sustained.

Q. (By Mr. Langa): Did he tell you in what way the [34] thing was to be promoted?

A. He showed me an agreement, and after I read that agreement I signed it.

Q. Did he advise you of the methods that would be used for distribution?

A. Well, according to the agreement.

Q. And what is that?

A. Well, just what the agreement reads.

Q. Do you have your agreement with you?

A. Yes, sir.

Mr. Langa: Your Honor, I offer this contract between Honolulu Customers Checkbook and Al Karasick.

The Court: It will be received as exhibit—

The Clerk: 4, your Honor.

(The document referred to was received as Plaintiff's exhibit 4 in evidence.)

Q. (By Mr. Langa): Showing you Plaintiff's exhibit 4; now, explain to us what you meant by

(Testimony of Al Karasick.)

your answer to the question as to the distribution of the Checkbook?

A. Well, the books were distributed among—how they sold them, how they got—I don't know, but they came with the coupons, and they tore the coupons out of the book at the window and gave the ticket. Anybody who buys a ringside seat and presents a coupon, we give them one free one as a matter of advertising, only. [35]

Q. I think, Mr. Karasick, you don't understand my question. I am asking you whether anything was said about how the—was it Mr. Lemon or Mr. de Bruin that you talked to?

A. I talked to Mr. Lemon.

Q. Was anything said as to how Mr. Lemon would distribute the coupons to people who would use them?

A. He told me according to the contract, after I read it.

Q. What do you mean by that?

A. Exactly what it said in the contract. That is what I agreed to do. I agreed to, according to contract, and I signed it, and I agreed to it, to the contract. That is the only conversation we had.

Mr. Langa: Your Honor, I submit that it is going to be necessary to lead the witness.

The Court: Did you have any conversation prior to the agreement——

The Witness: No. He came to ask me about the deal. He showed me the book and I accepted, and I signed the agreement.

(Testimony of Al Karasick.)

The Court: There was no conversation?

The Witness: That is all the conversation we had. The whole matter took only five minutes.

Mr. Langa: That is sufficient explanation. No further questions. [36]

The Court: Don't keep the agreement, now. It has been received in evidence, Mr. Karasick. The Court Clerk will hold it.

Mr. Greenstein: Would you mark two coupons? We ask that they be marked for identification.

The Court: Is there any objection to their admission to save time?

Mr. Greenstein: I want to offer them all at one time, because it is a book of coupons.

The Court: Well, I know, but these two particular coupons—show this to Mr. Langa.

Mr. Langa: I think we can stipulate that this is one of the coupons that was distributed by the Honolulu Customers Checkbook.

Mr. Greenstein: It may be stipulated.

Mr. Langa: I think that is sufficient.

The Court: Very well. Those may be received as F-1 and F-2.

(The documents referred to were received as Plaintiff's exhibits F-1 and F-2 in evidence.)

Mr. Greenstein: May I make the same offer on this? We only had exhibit E marked for identification. I neglected to have it received in evidence.

The Court: Very well. That will be received as Exhibit E. [37]

(The document referred to was received as Plaintiff's exhibit E in evidence.)

Mr. Greenstein: I have no further questions.

The Court: You are excused, Mr. Karasick.

Ladies and gentlemen of the jury, before excusing you, you are instructed not to discuss this case with any one, allow no one to discuss it with you, avoid reading or hearing anything about it, and form no opinions about it. You are excused until 2:00 o'clock this afternoon.

(At 12:00 o'clock noon an adjournment was taken until 2:00 o'clock p.m. this same afternoon.) [38]

December 1, 1958 at 2:00 P.M.

The Court: The record will show the jury is present and the Defendants and their counsel. Will you call your next witness, Mr. Langa.

Mr. Langa: Mrs. Mitchell.

BETTY MITCHELL

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Langa): Would you state your name and address and occupation, please.

A. Betty Mitchell, 2401 Kalakaua, Surf and Shore. It is a dress shop, shirt shop.

Q. You operate the Surf and Shore Shop?

A. Yes.

(Testimony of Betty Mitchell.)

Q. In your store, Mrs. Mitchell, do you ever give discounts on sales of merchandise?

A. We give them a dollar off after they have spent \$10.00.

Mr. Langa: I see. I have no further questions.

Mr. Greenstein: We would like—may we be permitted to ask whether this witness has had any dealings with customers service? [39]

The Court: I have no idea how Mr. Langa has prepared his case. Nor am I asking him how he is going to present it. I assume that these bits of evidence, or evidence such as this, could be tied in; otherwise, Mr. Langa wouldn't offer it.

Mr. Greenstein: Well, we give notice to the Court we shall call this witness as our own witness. May she be directed to return at 2:00 o'clock tomorrow or subject to our call?

The Court: How is your case progressing?

Mr. Langa: I think, your Honor, we probably will be through by noon tomorrow.

The Court: Very well. Mrs. Mitchell, will you return tomorrow afternoon at 2:00 o'clock.

Mr. Greenstein: Thank you, your Honor.

Mr. Langa: Mr. Furuya.

SATOSHI FURUYA

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Langa): Would you state your name and occupation, please?

(Testimony of Satoshi Furuya.)

A. My name is Satoshi Furuya. I am manager of the Nippon Theater.

Q. Do you know the Defendants in this case?

A. I am not quite sure. [40]

Q. Have you met Mr. Lemon?

A. I think I met him, but just once.

Q. Can you see him in the room now, the man you think you met?

A. Well, I think it is him, but it is so short time that I am not too sure.

Q. I see. How about Mr. de Bruin?

A. I think both of them was there, I believe.

Q. Did they explain to you a scheme for the promotion of a coupon book? A. Yes.

Q. This was about how long ago, do you know?

A. Gee, I can't remember how long it was. I think it was—I am not sure.

Q. Two months?

A. Or more than a month.

Q. More than a month. Maybe early in the summer? A. Yes.

Q. Did they in explaining the plan to you explain how they were going to—they proposed to give coupons to people?

A. Yes, they did. They told me that they will sell it for, I believe it was three and a half, or something like that, by house to house campaign.

(Testimony of Satoshi Furuya.)

Q. Did they say anything to you about [41] telephone solicitation? A. No.

Mr. Langa: No further questions.

Cross Examination

Q. (By Mr. Greenstein): I take it you entered into a contract or agreement with the Customers Checkbook? A. Yes, I have.

Q. And is this a copy of the agreement you signed with Customers Checkbook Company?

A. That is right.

Mr. Greenstein: Offer it in evidence, if the Court please, the next in order.

Mr. Langa: No objection.

The Court: It will be received as exhibit G.

(The document referred to was received as Defendants' exhibit G in evidence.)

Q. (By Mr. Greenstein): Now, you agreed to honor 10,000 coupons, did you not? A. Yes.

Q. You were interested in attracting patrons to your theater, were you not? A. Yes.

Q. When you signed up with the Honolulu [42] Customers Checkbook Company you didn't think you were doing anything wrong, did you?

A. No.

Q. Did they show you the coupons, a sample of the coupons? A. Yes.

Q. And are these the coupons? A. Yes.

The Court: How many are there? Two?

(Testimony of Satoshi Furuya.)

Mr. Greenstein: There are two in this book, your Honor. And we offer these in evidence.

The Court: They will be received as exhibit H-1 and H-2.

(The documents referred to were received as Defendants' exhibits H-1 and H-2 in evidence.)

Q. (By Mr. Greenstein): And you were ready to honor those coupons, were you not?

A. Well, as far as anybody came in, yes.

The Court: What was the answer?

The Witness: Yes, if it is legal to accept the coupons.

The Court: If it is legal to accept them?

The Witness: Yes, if it is legal.

Q. (By Mr. Greenstein): And at the time that you [43] entered into this agreement with Mr. Lemon or Mr. de Bruin you were prepared to honor as many as 10,000 of these coupons?

A. Well, I started about 3,000. They said, "How about taking out more?" So we thought about 5,000, I think it was. Then they say, "Why not make it 10,000?" And I thought—I didn't know how many people use the coupons. They said they didn't know. So we say OK.

Q. But nevertheless, you signed an agreement to honor 10,000; is that correct? A. Yes.

Mr. Greenstein: No further questions.

Mr. Langa: No further questions.

The Court: You are excused.

Mr. Langa: Mr. Higa.

(Testimony of Thomas Higa.)

A. Yes.

Q. Yes. And you signed an agreement covering both businesses, didn't you? A. Yes, sir.

Q. An agreement covering your Ala Wai Boat Rental business? A. Right.

Q. And an agreement covering your voice recording business; isn't that true? A. Right.

Q. Do you remember how many coupons you agreed to honor? A. Yes.

Q. How many?

A. These came back. They brought in the coupons.

Q. You are holding in your hand coupons that you honored?

A. That is right, some free rides, free recordings.

Q. Would you mind letting me see them, please?

(The witness hands documents to counsel.)

Mr. Greenstein: We would like to offer them into evidence.

Mr. Langa: I have no objection.

The Court: How many coupons are there? [47]

Mr. Greenstein: Eight coupons and a rubber band, your Honor.

The Court: They will be received as exhibits I-1 through I-8.

(The documents referred to were received as Plaintiff's exhibits I-1 through I-8 into evidence.)

Q. (By Mr. Greenstein): Mr. Higa, I observe

(Testimony of Thomas Higa.)

you are holding two pieces of paper. Are those copies of the two contracts you signed?

A. Yes, that is right.

Mr. Greenstein: May I have them, please?

(Documents handed to counsel.)

Mr. Greenstein: Offer them in evidence.

Mr. Langa: No objection.

The Court: They will be received as exhibits J-1 and J-2.

(The documents referred to were received as Plaintiff's exhibits J-1 and J-2 into evidence.)

Mr. Greenstein: Now, when you signed that agreement, Mr. Higa, you had agreed to honor 5,000 coupons in connection with your boat rental business before you agreed to honor 5,000 coupons with respect to your voice recording business?

A. Yes. [48]

Q. And that was for the purpose of promoting your businesses, bringing in new customers?

A. Yes, that is right.

Q. At that time did you think you were doing anything wrong?

A. No, I didn't think there was anything wrong.

Q. Now, you weren't concerned with how these coupons were distributed, were you?

A. I beg your pardon?

Q. You didn't care how these coupons would be distributed, whether by direct sale or telephone?

A. Distribute the coupons, the two gentlemen, they are going to take care of, see.

Q. In other words, you left it up to the De-

(Testimony of Thomas Higa.)

endants to take care of how they would pass these to the public? A. That is right.

Q. You weren't particularly interested in the medium they would employ?

A. I beg your pardon?

Q. You weren't interested in how or what means they would use to pass these on to the prospective customers; isn't that right?

A. I believe they were saying they used the radio, television and house to house and newspaper advertising, see. That is I agreed to that. [49]

Q. You were interested in having people come to your place? A. That is right.

Q. And you were interested in having them come with these coupons, weren't you?

A. That is right.

Mr. Greenstein: No further questions.

Mr. Langa: No further questions.

The Court: You are excused, Mr. Higa. Thank you.

Mr. Langa: Martha Ann DeCayette.

MARTHA ANN DeCAYETTE

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Langa): Would you state your name and address for the record, please?

A. My name is Martha Ann DeCayette, 1881 Kalakaua Avenue.

(Testimony of Martha Ann DeCayette.)

Q. Now, Mrs. DeCayette, have you ever met Mr. Lemon or Mr. de Bruin? A. Yes, I have.

Q. Do you know them both?

A. Personally, no.

Q. Do you know who they are? [50]

A. Yes, I do.

Q. Are they here in this room?

A. Yes, they are.

Q. Please point them out.

A. That is Mr. Jack Lemon sitting on my far left and Mr. Martin de Bruin is sitting in the middle.

The Court: The record will show the witness has identified the Defendants.

Q. (By Mr. Langa): When did you first meet these two men?

A. I believe it was in June of this year.

Q. Please tell us the circumstances under which you met them?

A. I was working for them as a telephone operator.

Q. I see. Where was this?

A. At the Merchandise Mart Building.

Q. What was your job while you were working for them as a telephone operator?

A. Well, I had applied for the job from the newspaper, and I had gone up to the Merchandise Mart Building and applied for it. And we had a sales speech to say over the phone in which—I mean it was stated that—to answer a question, and

(Testimony of Martha Ann DeCayette.)

if you have answered it correctly, I mean, there were several things that would be given to you.

Q. Mrs. DeCayette, I am showing you a piece of paper [51] with typewriting on it and some various other notations. Can you identify this piece of paper?

A. Yes. This is the sales speech.

Mr. Greenstein: I can't hear the witness.

The Court: You will have to keep your voice up.

The Witness: This is the sales speech that the operators read from.

Mr. Langa: I see. Your Honor, I offer this in evidence.

Mr. Greenstein: No objection.

The Court: It will be exhibit number 5.

(The document referred to was received in evidence as Plaintiff's exhibit number 5.)

Q. (By Mr. Langa): Now, is this the same sales pitch you used all the time that you were working for the Defendants?

A. Well, it was changed later on. I mean there were new business men that had gone into it. I mean there were several changes, but not too very many. But that is the same sales speech.

The Court: Is that the same as the one from George's Service Station?

Mr. Langa: There is a slight difference, your Honor. This one begins, instead of saying, "This is George's Service," it starts out, "This is Honolulu Customers Checkbook calling." It lists some different items. [52]

(Testimony of Martha Ann DeCayette.)

The Court: Why don't you just read it?

Mr. Langa: Shall I?

The Court: Yes.

Mr. Langa: I have been trying to refrain simply to save time.

The Court: I thought if it was somewhat different from the other one it might be interesting.

Mr. Langa: This sales pitch reads as follows: This is reading from Plaintiff's exhibit number 5. At the top as on the other one it starts out, "Do not take orders from children. For call backs give this telephone number, 68079. It reads as follows:

"Hello, is this number" blank?

"This is Honolulu Customers Checkbook calling and I have some wonderful news for you. If you can answer the following question correctly, you will have the opportunity to receive a Customers Checkbook worth over \$50 in useful car services, entertainment tickets and free gifts.

"Are you ready for the question?

"1. What is the second largest district on the Island of Oahu?

"Answer. Wahiawa or Kailua.

"I'm sorry, the answer is the City of Wahiawa or Kailua, but since you have tried so hard we will give you another question. [53]

"2. In which hand does the Statue of Liberty hold the torch?

"Answer. Right.

"Well, congratulations. Now you will receive the following:

(Testimony of Martha Ann DeCayette.)

"One free pizza from Larry Vincentes.

"Two free dance lessons from Arthur Murrays.

"Free boat ride.

"One year's subscription to Sports Extra Magazine.

"Free ticket to wrestling matches.

"Free T.V. service call.

"Free 5 x 7 silvertone photograph of your child.

"And for your car you will receive:

"Two free grease jobs.

"Free car wash.

"Free flat tire repair.

"Free battery charge.

"Free brake adjustment.

"Free tire rotation.

"Free wheel bearing packed.

"Free radiator flush.

"Your points cleaned and set and many other valuable services.

"Now, these are only a few of the many wonderful values offered by 20 of your local business men who have gone [54] to a great expense in order to acquaint you with their places of business. The only cost to you is \$4.75 for printing and handling cost of your Customers Checkbook. In all, you do receive over \$50 in useful values. These books are limited to one per family, and they will be delivered by your mailman C.O.D. Do I have the right address, Mrs." and a blank.

"Now, your Checkbook will be delivered to you next week. You understand when your mailman

(Testimony of Martha Ann DeCayette.)

brings your Customers Checkbook you pay him only \$4.75. The business men want and respect your patronage and we wish you a good time, so take advantage of these wonderful offers in the Honolulu Customers Checkbook.

“Thank you and goodbye.”

And then below the sales pitch it says—this was an addition which was not on the other one—“Mention only the offers above. The above services are offered for \$4.75.” Your Honor, this is a portion of this bottom which is missing. I take it from this it is, “Do not tell the people they win the services.”

Would you care to put that in instead of this?

The Court: Is that a better copy?

Mr. Langa: I will stipulate to offer that in evidence.

Mr. Greenstein: Yes. That may go in.

Mr. Langa: That is a better copy. [55]

The Court: That one may be substituted for the other as exhibit number 5.

Mr. Langa: Your Honor, they are not exactly alike in that there are some other comments in pencil aside from the typewritten words. I would suggest that both go in.

The Court: Very well. Make them 5-1 and 5-2, or 5-A and 5-B, rather.

Q. (By Mr. Langa): Did anyone Mrs. DeCayette, give you any instructions on how to proceed in your job?

A. Well, I was a night telephone operator, and when I first went in there to apply for the job, I

(Testimony of Martha Ann DeCayette.)

had the shift that worked from 3:00 to 9:00, and there was a girl there, I believe she was the secretary, Virginia, that gave me some sort of instructions as to what to do. But mostly they based it on the speech—I mean the sales pitch. That is what I was to say over the phone, and that was about all.

Q. And while you were working at your job did you ever see Lemon or de Bruin in the——

A. Oh, on several occasions, but they were always in another room. I mean we were in the room, the telephone operators were in a room alone by ourselves.

Q. About how many telephones were in the room?

A. I would say about 10, I believe.

Mr. Langa: I have no further questions. [56]

Cross Examination

Q. (By Mr. Greenstein): Approximately when was it that you were first employed by Lemon and de Bruin, please?

A. I believe it was either the ending of May or beginning of June. I am not quite too sure.

Q. And I take it you were one of the girls that were engaged in soliciting orders on the telephone?

A. That is right.

Q. Now, before you commenced your actual work of using the telephone, weren't you given general instructions that you were to follow the sales pitch as was printed before you?

A. Well, like I said, I mean when I first started

(Testimony of Martha Ann DeCayette.)

there, there was another telephone operator sitting beside me, Verna May Chung, and Virginia, she was the secretary at that time on the night shift, I guess, just said to say what the paper was before me.

Q. Yes. In other words, you had a typewritten sales pitch in front of you, such as is in evidence; right?

A. That is right.

Q. And you were told to read from this typewritten piece of paper, is that correct?

A. Yes.

Q. And weren't you specifically instructed by somebody, whoever it might be, that under no circumstances were you to tell any of the prospective purchasers that they were winning anything? [57]

A. Yes. I mean I was told by Virginia that they didn't win it.

Q. They would just be entitled to receive something?

A. That is right.

Q. Now, in connection with the various sales pitches that you made on the telephone—and I assume you made some?

A. Yes.

Q. Did you ever fail to tell a prospective customer that what they were getting they would be charged a specific amount of money for; did you always tell the customer it would cost them \$4.95, whatever the price was?

A. For the Customers Checkbook, yes.

Q. Did you always inform the customer that the Customers Checkbook would be delivered to them C.O.D. and they would have to pay a C.O.D. charge?

(Testimony of Martha Ann DeCayette.)

A. By the mailman.

Q. Yes. They had to pay the mailman. There is no question about that in your mind?

A. No.

Q. Is it fair to say that as well as you remember you followed the language of the sales pitch which was before you in front of the telephone, is that right? A. Yes.

Q. How long did you work for Lemon and de Bruin? [58]

A. I think it was a week and two days, I am not sure.

Q. I see. And how were you girls to be paid; how were you to be paid?

A. Every two weeks.

Q. I beg your pardon?

A. Every two weeks.

Q. On a salary or commission basis?

A. Commission basis.

Mr. Greenstein: No further questions.

Mr. Langa: I have no further questions.

The Court: You may step down. Thank you.

Mr. Langa: Mrs. Chung.

VERNA MAY CHUNG

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Langa): Would you please tell us your name and address, please?

(Testimony of Verna May Chung.)

A. My name is Mrs. Verna May Chung, 1819 Houghtailing Road.

Q. Have you ever met Lemon or de Bruin?

A. Yes, I have.

Mr. Greenstein: We will stipulate she was an employee of theirs. [59]

The Court: Very well.

Q. (By Mr. Langa): Do you recall the circumstances under which you became an employee of the Defendants?

A. Well, I answered an ad that was in the paper. The ad stated that they wanted telephone survey girls, and if you qualified you would—there was a salary of \$1.00 an hour—says a \$1.00 an hour if you qualified, and says to apply at Merchandise Mart Building in Room 203, I believe, to see Mr. Lemon.

Q. Did you see Mr. Lemon there?

A. Yes. The first day that I went up to the Merchandise Mart Building I saw Mr. Lemon, but I didn't talk to him directly. I spoke to, I believe it was Judy or some other—there was another girl there—Judy was the first secretary, I think, and then later on Virginia.

Q. What happened then?

A. Well, I walked into the room and out in the hallway stood the other girls. They were also answering the ad in the paper. So I walked in and I spoke to Judy and I told her I was answering the ad and I was looking for Mr. Lemon. So she gave me a pencil and piece of paper and she said

(Testimony of Verna May Chung.)

to jot our name down on a piece of paper before us. So before I left I asked her when we would be called, and she asked me if I had any experience with the telephone. I told her a little. So she gave me—she just told me—she took me [60] to another room and she gave me a torn telephone page and sales pitch and sales pitch and just went over the sales pitch with me roughly and made me sit in a room for the first day.

Q. I show you Plaintiff's exhibits number 1, 5-A, and 5-B. Is that the telephone pitch you used?

A. Yes, it is.

Q. During the period that you were working for the Defendants on the telephone there did you use both forms of that sales pitch, both the yellow paper form and the white, the yellow being exhibit 1?

A. I used the white one.

Q. Do you remember the yellow one at all?

A. No. But the pitch seems to be the same. But I haven't used—I didn't use the other one.

Q. I am not referring now to the certain piece of paper, but the words it has?

A. No, I didn't use the yellow one.

Q. Now, subsequent to the time you started working did you receive any further instructions as to how to perform your job?

A. No, just follow the sales pitch.

Q. And did you receive any instructions on how to handle complaints?

A. Well, at first Mr. Lemon and—we would go in and call Mr. Lemon, or Virginia would come in

(Testimony of Verna May Chung.)

and handle the complaint. [61] And then later on we were instructed to leave the phones off the hook after we got through calling each customer that day. Then later on we were instructed, when the complaints were coming in by a whole flock, we were instructed to say that—talking a pidgin language and just say, “I am just the janitress and I don’t understand.”

Mr. Langa: I have no further questions.

Cross Examination

Q. (By Mr. Greenstein): Was this after the newspapers had given a lot of publicity to this business? A. No, that was before.

Q. Are you sure?

A. That was around the third—started the third week I worked there, the third and fourth week.

Q. The third week?

A. The third or fourth week.

Q. Or was it the fourth week?

A. About the fourth week.

Q. It was the fourth week, wasn’t it? And wasn’t it after the third week that various people tried to put them out of business?

A. Would you mind repeating what you said?

Q. You say these complaints started to come in pretty heavy after the fourth week, is that correct? [62]

A. Yes.

Q. Wasn’t it after the third week that they were

(Testimony of Verna May Chung.)

in business that people were trying to put them out of business?

A. Well, that I can't say, but there were a few complaints coming in.

Q. But your job was as a telephone girl?

A. Yes.

Q. Right. And I take it you followed your instructions? A. Yes.

Q. You followed your instructions by informing everybody there would be a charge for the Customers Checkbook; right? A. Right.

Q. And that they would have to pay for it through the process of the use of the mails and C.O.D.; right? A. Right.

Mr. Greenstein: No further questions.

Mr. Langa: No questions.

The Court: You may step down. Thank you.

Mr. Langa: Miss Houston.

PATRICIA HOUSTON

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows: [63]

Direct Examination

Q. (By Mr. Langa): Would you please state your name and address?

A. Patricia Houston, 244 Robinson Avenue, Pearl City, Oahu.

Q. And your occupation?

A. I am in school.

Q. Now, Miss Houston, have you ever had occa-

(Testimony of Patricia Houston.)

sion to work for the Defendants in this case as an employee? A. Yes, I have.

Q. Mr. Lemon and Mr. de Bruin?

A. Yes.

Q. Are they in the room?

A. Yes. Mr. Lemon is on my extreme left and Mr. de Bruin is sitting right next to them.

The Court: The record will show the witness has identified the Defendants.

Q. (By Mr. Langa): What was the nature of your employment?

A. Well, I worked on the telephone. I called up the people that we sold the checkbooks to.

Q. I see. And did you use a typewritten script in selling the checkbooks? A. Yes, I did.

Q. Showing you Plaintiff's exhibits 1, 5-A and 5-B, is that the script that you used, or is that a copy of a [64] script that you used?

A. The white one. I mean I didn't use the yellow one.

Q. Were you given any instructions on the use of that script and generally performing your job?

A. Well, when I started working there, they gave me the piece of paper, that white one, and some other little pieces of paper that you write down the name and address on, and a pencil, and they sat me down and they just told me that I should read what was on the paper, just how it was written on the paper. And then I don't think anything else

(Testimony of Patricia Houston.)

from them, but I heard the other girls, they would tell me, like, "Don't tell them that you are selling anything and that they won anything." And they were the ones that told me that I would get \$.50 for each one I sold.

Q. Do you recall Mr. Lemon giving you any advice on this question of performing your job or what to tell the customers?

A. Just read the paper.

Q. I didn't hear the answer.

A. Just to read the paper.

Q. Did you receive any instructions on what to do about complaints?

Mr. Greenstein: I am going to object to that as being immaterial, if your Honor please, doesn't tend to prove [65] or disprove any of the issues of the indictment.

The Court: I think that is right, Mr. Langa. The other testimony went in without objection.

Mr. Langa: Your Honor, it is only offered as tending to show the state of mind of the Defendants. I don't offer it as a central portion of the testimony, and I withdraw the question, if it will make the Defendants happier.

The Court: Very well.

Mr. Langa: I have no further questions.

Mr. Greenstein: No questions.

The Court: You may step down, Miss Houston.

Mr. Langa: Miss Miller.

SYLVIA ANN MILLER

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Langa): State your name and occupation, please?

A. Sylvia Ann Miller, 3110 Huelani Drive, and I am a student.

Q. Have you ever been employed by Mr. Lemon or Mr. de Bruin? A. Yes.

Q. State the nature of your employment?

A. I more or less was a telephone operator. [66]

Q. Will you tell us specifically the circumstances of your hiring on and what you were doing as a telephone operator?

A. Well, I presume you mean the day I got the job. Well, I walked in on a conversation, really, and I just stood there for a few minutes until they got through talking. And then Virginia——

Q. Pardon me for interrupting you, but who is this?

A. Well, I don't know. I am not sure which man it was, but it was either Mr. Lemon or Mr. de Bruin who was talking.

Q. Was it either of the gentlemen sitting at this table to my right? A. Yes.

Q. It was one of them? A. Yes.

Q. But you don't know which it was?

A. No, I am not sure which one.

Q. Please go on.

A. And then Virginia took me into the next

(Testimony of Sylvia Ann Miller.)

room and she sat me down and told me to read whatever was on the paper over the telephone. And she also mentioned that even if they gave a different answer from the one that was on the paper to just say, oh, it was right, anyway. And that was more or less what she said, in those words. And then I sat down and started to phone. [67]

Q. This was about how long ago?

A. This was approximately on June 9th or 10th, I think.

Q. And did you use a typewritten script on the telephone? A. Yes.

Q. Would you look at those exhibits 1, 5-A and 5-B, which are by the witness stand there?

A. I recognize both of the white ones but not the yellow one.

Mr. Langa: I have no further questions.

Mr. Greenstein: No questions.

The Court: You are excused, Miss Miller.

The Witness: Thank you.

Mr. Langa: May I have a moment, your Honor?

The Court: Yes.

Mr. Langa: Your Honor, I think if I call any more of the telephone girls now it will be repetitious. I have four other witnesses who were subpoenaed for tomorrow morning. I was very surprised by the speed with which this afternoon's session has gone.

The Court: Mr. Greenstein might stipulate that if more telephone operators were called they would

testify in a manner similar to the last two. Is that true?

Mr. Greenstein: Well, I was thinking that perhaps my colleague here was asking that this matter stand over to [68] tomorrow morning, and I was ready to join with him. We have both gone faster than anticipated from the standpoint of availability of the witnesses.

Mr. Langa: I have only four more witnesses, all of whom I don't think I could get until tomorrow morning. I haven't heard from one yet as to whether he has a ride. But if it is acceptable to the Court and to Mr. Greenstein, why, all of them are subpoenaed for tomorrow morning.

The Court: At what time?

Mr. Langa: 10:00 o'clock. Oh, I have one witness I can put on out of order now, your Honor, the United States Marshal. I would be glad to do that.

The Court: Very well. You mean Mr. Clark or one of his deputies?

Mr. Langa: Mr. Clark. I have just been informed that the witness I had sent out for if the Court please, will not be able to be here. They haven't found him yet. So aside from Mr. Clark, why, I would like to continue with the rest of my witnesses tomorrow instead of today.

The Court: How long do you anticipate their testimony will take?

Mr. Langa: Well, if it goes like this afternoon, I think all four of them in an hour.

The Court: Are they persons named in the indictment? [69]

Mr. Langa: Yes, your Honor. I expect them to testify to the telephone calls and the mail which they received.

THOMAS R. CLARK

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Langa): Would you state your name and occupation for the record, please?

A. Thomas R. Clark, United States Marshal, District and Territory of Hawaii.

Q. Now, Mr. Clark, may I call your attention to June the 27th or thereabouts of this year, did you have occasion to execute a search warrant and seize some property from the Postmaster at Honolulu? A. I did.

Q. And would you tell us the nature of that property?

A. Upon receipt of the search warrant I contacted Mr. Lino, Albert P. Lino, the Postmaster of this City in this building, and apprised him of what I had. And he assured me that he would have all the letters together. And on the 14th of July I made seizure of 1,874 C.O.D. letters which are now contained in those six pouches. And I have had those six pouches in my custody since that date.

Q. These C.O.D. letters which you seized were letters bearing the return address, Honolulu Custo-

(Testimony of Thomas R. Clark.)

mers Checkbook, 204 Merchandise Mart, and addressed to various people in Honolulu?

A. Yes.

Mr. Greenstein: I think that is a little bit leading, your Honor.

The Court: Yes, it is leading.

Q. (By Mr. Langa): Well, did the search warrant carry a description of the property which you seized? A. It did.

Q. How was that described?

A. Well, I can't repeat it verbatim now.

Q. Just generally speaking, if you will, just tell us enough so that we know approximately what it was that you were seizing?

Mr. Greenstein: May I interpose an objection to this unless the U. S. Attorney represents that these pieces relate to specific counts of the indictment; otherwise, I see no materiality, except one, to inflame and prejudice the jury.

The Court: What do you have to say on that?

Mr. Langa: Your Honor, the indictment charges a scheme to defraud.

The Court: Is that for the purpose of showing state of mind? [71]

Mr. Langa: The overall plan or scheme.

The Court: It will be received for that limited purpose, and the objection is overruled. Now, do you recall the question, Mr. Clark?

The Witness: No, I don't. Please repeat the question.

The Court: Describe as best you can what you

(Testimony of Thomas R. Clark.)

were supposed to seize under the search warrant?

The Witness: I was supposed to seize C.O.D. letters addressed to the various addressees which came from the Honolulu Customers Checkbook, 204 Merchandise Mart, Honolulu, Territory of Hawaii.

Q. (By Mr. Langa): Do you know offhand how many bags there are in the property you have referred to, the pouches you have referred to?

A. Six.

Q. Six of them all together? A. Yes.

Mr. Langa: Your Honor, I offer these six pouches of mail for the limited purpose previously mentioned.

Mr. Greenstein: Well, I object, your Honor. I can't see any purpose that would be subserved by bringing in these six pouches into evidence. I think the oral testimony is sufficient. It is my opinion they are being used only for the purpose of being prejudicial and inflammatory. [72]

The Court: Do you have any further examination of this witness, Mr. Langa?

Mr. Langa: I have no further questions for this witness.

The Court: I will reserve ruling on that offer. Do you have any cross examination, Mr. Greenstein?

Mr. Greenstein: Yes, just one or two questions.

Cross Examination

Q. (By Mr. Greenstein): These letters all came from the Registry Department of the United States Postoffice or part of the C.O.D. Department?

(Testimony of Thomas R. Clark.)

A. I couldn't say they came from the Registry Department, but they came from the Postmaster's office.

Q. Came from the Postmaster's office?

A. That is right.

Q. Did they all bear recordation from the C.O.D. Department? A. Yes.

Q. Did they all show that the cost by the government for C.O.D. was paid?

A. On the face of each individual, yes.

Q. Do you know how much that cost is?

A. Well, there were different figures. They ran from \$2.95. [73]

Q. No, I mean the Postoffice charge. I don't mean the amount to be collected?

A. I don't follow you.

Mr. Greenstein: Withdraw it. I have no further questions.

Mr. Langa: No further questions.

The Court: You are excused, Mr. Clark.

Mr. Langa: Your Honor, may we have a recess until tomorrow morning at 10:00?

The Court: I would like to keep going on, but if you have no witnesses, there is very little we can do.

Mr. Langa: Your Honor, I made a mistake in dating my subpoenas. I didn't realize it would go this fast. These four people all have jobs and are difficult to call on such short notice.

The Court: Well, ladies and gentlemen of the jury, you are going to get a bonus. Perhaps you can go out and do a little early shopping. You are instructed not to discuss this case with anyone, allow no one to discuss it with you, avoid reading or hearing anything about it, and form no opinions about it. You are excused until 10:00 o'clock tomorrow morning.

Mr. Greenstein: Your Honor, before the jury is excused, for the purpose of the record may I move that the postal cart with these six pouches be removed from the Courtroom [74] and not be permitted to make entry back to the Courtroom unless they are admitted in evidence.

The Court: I am going to discuss that with counsel after the jury leaves. You are excused.

(The jury leaves the Courtroom.)

The Court: That is a nice question, Mr. Langa, on your offer of 1,874 letters of this type.

Mr. Langa: I am not sure I know what the question is.

The Court: Well, whether it is admissible even for the limited purpose that you offer it.

Mr. Langa: I think, really, the question is that although it is certainly admissible for that purpose there may be other purposes, also. But the indictment, among other things, charges that the Defendants conceived a scheme, device, a scheme and artifice to defraud that involved carrying on a business of soliciting orders for checkbooks by the use of

the telephone and soliciting orders from persons to be defrauded and making delivery of the Honolulu Customers Checkbook by means of the use of the United States Postal Service. Now, the overall nature of the scheme is larger than four pieces of mail that have been put into the postoffice—actually five pieces of mail were charged. Simply because, as a technical requirement of the statute, specifically identified pieces of mail have been put in; however, this [75] indictment could involve 1,874 counts in addition to those which are listed in the indictment. Certainly, the Defendants are not prejudiced in any way by our having failed to put so many counts into the indictment. And the only difference between the present case and that case is that the indictment is fewer pages and lesser possible maximum penalty could be imposed on the event of conviction. In essence, then, the Defendant is really only complaining that we didn't put 1,879 counts in the indictment, whereas I am sure if we had done so he would have complained bitterly about the size of the indictment. There is no question that if the indictment had been that big, each of these letters could have been admissible separately and would have to be offered separately.

The Court: What do you have to say to that, Mr. Greenstein?

Mr. Greenstein: I have, first, this to say, your Honor, that when the government saw fit to draft or cause an indictment to be used, it had at its command the opportunity to make as many counts

as it saw fit. It saw fit to make, I think, five counts. In our opinion there can be only one reason for permitting this in evidence, or for the Prosecutor to have brought it in this way, and that is to impress the jury, and we submit improperly, with the size and ponderosity of those pouches, to make out of what might be nothing, something. The point is this, your Honor: These are all C.O.D. [76] packages. If all counsel was trying to do was bring out the fact that there were so many pieces, he had merely to subpoena the C.O.D. Department, because for each C.O.D. envelope there is an entry. He could have come in here with just a piece of paper or a summarization and said that "Our records show there were 1,874," to which we would have no objection. We maintain that bringing in six oversize pouches in this manner, which really adds nothing, is merely to inflame and prejudice the jury by the format and style of this attempted evidence.

The Court: I will reserve ruling on the offer and rule on it first thing in the morning.

Mr. Greenstein: May we respectfully request that these items be in the custody of the Clerk in the Clerk's office and not be brought physically into the Courtroom unless they are admitted?

The Court: If they are brought into the Courtroom, I hope that the wheels will be oiled. The case will be continued until 10:00 o'clock tomorrow morning. The Court will adjourn until that time.

(An adjournment was here taken for the day.) [77]

Honolulu, T. H.

December 2, 1958 at 10:00 A.M.

(Case called.)

The Court: Are you ready, gentlemen?

Mr. Langa: Ready for the Plaintiff, your Honor.

Mr. Greenstein: Mr. de Bruin was parking his car. I indicated to the Clerk he might be a minute or two late.

The Court: The record will show the jury is present and the Defendant Lemon.

Mr. Greenstein: Yes.

The Court: What time did he start parking his car, do you know?

Mr. Greenstein: No, I don't your Honor. He was in my office earlier. He was supposed to be here before 10:00.

May the record now show that Mr. de Bruin is in the Courtroom?

The Court: Yes, the record will show that it is two minutes after 10:00. The Court convened at 10:00 o'clock, and in accordance with the custom that has been established in this Courtroom for some time it will cost your client \$1.00 for each minute he was late. That will be taken care of later on. That goes for attorneys and jurors. In case you think I am showing partiality here, I am not.

At the close of the session yesterday the Court [78] took under advisement the offer in evidence of six pouches containing 1,874 letters which were seized by the United States Marshal. The objection is overruled and the pouches with the contents—I

assume they are as designated by the Marshal—will be received in evidence as Exhibit next in order—5, Mr. Clerk?

The Clerk: Exhibit 6, your Honor.

The Court: Exhibit No. 6. And I will instruct the jury at this time on the reason for admitting them, or the purpose for which they are admitted. These envelopes in the pouches are received in evidence because they are so blended or connected with the offenses on trial, and they incidentally involve the evidence which has been received, they also explain the circumstances, and in the Court's judgment tend logically to prove elements of the crime charged. I find that it is so related to or connected to the crimes charged as to establish a common scheme or purpose so associated that proof of one tends to prove the other; that they are connected with a single purpose and in pursuance of a single object. They are also received for the purpose of establishing identity, guilty knowledge, intent and motive. You may call your next witness, Mr. Langa.

Mr. Langa: Mr. Nozawa.

NANCY NOZAWA

called as a witness on behalf [79] of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Langa): Mrs. Nozawa, would you please tell us for the record your name and occupation?

(Testimony of Nancy Nozawa.)

A. My name is Nancy Nozawa and I am a supervisor, fiscal accounting clerk at the Naval Supply.

Q. Now, calling your attention to the period of the latter part of May, early part of June of this year, did you receive a telephone call from the Honolulu Customers Checkbook? A. Yes, I did.

Q. Do you know about when? Can you pin it down to a closer time than I have?

A. I received a call at about 9:30 on Saturday, June the 14th.

Q. Now, do you recall the substance of that telephone call? A. Yes, I do.

Q. Would you please tell us briefly, in your own words, the nature of the call?

A. Yes. I received a telephone call from a woman who identified herself as from the Customers Checkbook. And she told me it was a contest and that if I could answer the following question, I would receive some valuable merchandise. The question asked was: What is the second largest city on [80] Oahu, to which I answered Wahiawa. And she said, "Congratulations. You have—this is some of the merchandise you have won." Oh, she mentioned some tickets to the wrestling matches, boxing matches, a meal at Vincente's and some oil and grease job and minor brake adjustments, car wash for Ray's Shell Service. Then she concluded her conversation by saying, "You have won over \$60 worth of valuable merchandise for a cost of \$4.75,"

(Testimony of Nancy Nozawa.)

which was to cover postage and the cost of printing the checkbooks, to which I agreed.

Q. Now, Mrs. Nozawa, I am showing you an envelope bearing a postmark, Honolulu, Hawaii, bearing the return address, Honolulu Customers Checkbook, and your name as addressee. Do you recognize that?

A. Yes. And I have signed that. I did receive this, yes.

Q. Do you recall receiving that in the mail?

A. Yes, I did. I received this on June 17th.

Mr. Langa: Your Honor, I offer this envelope and its contents in evidence.

Mr. Greenstein: No objection, your Honor.

The Court: It will be received as exhibit number 7.

(The document referred to was received as Plaintiff's exhibit 7 in evidence.)

Mr. Langa: I have no further questions. [81]

Cross Examination

Q. (By Mr. Greenstein): Now, Mrs. Nozawa, are you sure that the party who called you said, in effect, that this was a contest?

A. Yes, I am quite sure.

Q. You are quite sure of that. And are you likewise quite sure that this party said you would receive merchandise of over \$60? A. Yes, \$60.

Q. You are quite sure about that. The party never used the words, the figure \$50 in value?

A. No.

(Testimony of Nancy Nozawa.)

Q. Now, you were told that you would have to pay for this coupon book, weren't you?

A. Yes, to the extent that it would cover the printing and postage.

Q. You were told you would have to pay how much? A. \$4.75.

Q. Plus C.O.D. charges, I believe?

A. \$4.75 was to cover the printing and postage.

Q. And you were charged \$4.75?

A. I paid \$4.90.

Q. Tell me, Mrs. Nozawa, who presented Plaintiff's number 7 to you, this envelope?

A. The United States Postal Delivery man.

Q. The mail man? [82] A. Yes.

Q. Right. And did he tell you he had something C.O.D.? A. Yes, he did.

Q. Did he tell you what the charge would be?

A. He told me in order to redeem it I would have to pay \$4.90.

Q. And, of course, you know you did not have to redeem it; you know that, don't you?

A. Yes.

Q. You could have told the mail man that you didn't want it? A. Yes.

Q. I am going to direct your attention to the time and occasion of this phone call you say you had and ask you if it didn't go something like this: Did the party first start off by—by the way, what is your phone number? A. 990372.

Q. Didn't the party first start off by asking you if this was telephone number 990372?

(Testimony of Nancy Nozawa.)

A. Well, to tell you the truth, I didn't take the call. When it first rang my daughter answered the phone and called me to the telephone. So I don't know what the woman said.

Q. I see. Now, wasn't the first thing that the woman said: "This is the Honolulu Customers Checkbook calling"? [83]

A. Yes, I think she identified herself.

Q. Didn't she say: "This is the Honolulu Customers Checkbook calling"? A. Yes.

Q. And didn't she say: "I have some wonderful news for you"?

A. No, I think she started right off and said this was a contest.

Q. This was a contest? A. Yes.

Q. So you would deny that she said, "I have some wonderful news for you"?

A. I am not denying it. I am saying I didn't hear it.

Q. Did she say, "If you can answer the following question correctly, you will have the opportunity to receive a Customers Checkbook worth over \$50"?

A. Would you state that question again?

Q. Did this party who called you then say in effect, "If you answer the following question correctly, you will have the opportunity to receive a Customers Checkbook worth over \$50"?

A. May I qualify that question to say—

Q. Would you please first answer my question. Then you may qualify the answer. [84]

A. No.

(Testimony of Nancy Nozawa.)

Q. She didn't say that. Did she say, "Are you ready for the question"?

A. No, I don't think so.

Q. Did she say, "What is the second largest city on the Island of Oahu"? A. Yes, she did.

Q. Then she said, "You will receive something," and she listed many items; right?

A. Well, she said some of the merchandise I would receive and she did list some.

Q. She mentioned pizza from Larry Vincente's?

A. No. She mentioned a meal from Vincente's, if I remember right.

Q. Do you know whether the—this envelope that you brought back—that you brought into Court—no—which you have identified as the envelope you received and paid the C.O.D. and money order charges on—— A. Yes.

Q. ——did it contain a coupon from Larry Vincente's? A. Yes, it did.

Q. Were you told you would receive some free dance lessons from Arthur Murray's?

A. I believe she did.

Q. And did the Honolulu Customers Checkbook that you [85] received include a coupon for free dance lessons at Arthur Murray's?

A. Yes, it did.

Q. Were you told you would get a free boat ride?

A. I don't think she mentioned the boat ride. I am not sure.

(Testimony of Nancy Nozawa.)

Q. Do you know whether your coupon book includes a free boat ride?

A. Yes, it did, with some additional investment on my part.

Q. Were you told that you would get free tickets to wrestling? A. Yes, she did.

Q. And did the book include some coupons for wrestling? A. I think it did.

Q. And were you told that you would get free T.V. service, a free T.V. service call?

A. I don't remember her mentioning that.

Q. Do you know whether this book includes a coupon for free T.V. services?

A. Well, I don't remember.

Q. I will show you one of the coupons in the Honolulu Customers Checkbook which is part of the exhibit we are referring to, and ask you if it includes a coupon for free T.V. service? [86]

A. Yes, it does.

Q. And you were told that for your car you would receive various services, also?

A. Yes.

Q. And did this coupon book include a card relative to the giving of services, free services?

A. Yes. That is the card you have in your hand.

Q. Yes. So, now, actually, isn't it true, Mrs. Nozawa, that with respect to every item that was mentioned to you, they are all covered by coupons in this book; isn't that true?

A. Yes. Your Honor, I would like to explain.

The Court: Yes, you may.

(Testimony of Nancy Nozawa.)

The Witness: Fully.

The Court: You may.

The Witness: Yes, it does cover — include the items mentioned, but, now, in her conversation she led me to believe that there were many others and she said—because she started by saying “Some of the things you have won are.”

Q. (By Mr. Greenstein): Yes. But as you are sitting here and testifying today under oath, Mrs. Nozawa, you cannot think of anything that she mentioned you would be entitled to that was not reflected in a coupon or card that you received, can you?

A. Well, she led me to believe——

Q. I beg your pardon? [87]

A. She led me to believe that there were many merchandise gifts that I had won.

Q. Well, can you mention just one item that is not reflected in a coupon?

A. That she didn't mention, you mean? I don't understand your question.

Q. Can you mention one item—— A. Yes.

Q. ——that the person on the telephone mentioned to you that you would receive that you did not receive in the form of a coupon?

A. Well, sir, I think I made myself clear when I said she had mentioned some items that I would receive but she didn't mention all of the items I was supposed to receive.

(Testimony of Nancy Nozawa.)

Q. Yes. And I am trying to develop that by taking the liberty of asking you can you inform this Court and jury as to just one item that she mentioned that is not contained in this Customers Checkbook?

A. Well, the items that I mentioned that she had mentioned are in the Checkbook.

Q. Precisely? A. Yes.

Q. Now, how many times did this telephone operator inform you that there would be a charge in connection with this Checkbook? [88]

A. Once.

Q. Well, now, didn't she mention it at least twice? A. I said once.

Q. You say once?

A. Yes. In the—in concluding her, you know, offer of free merchandise, she did mention that I would have to pay for the printing of the Checkbook and the postage, which was \$4.75.

Q. Did she inform you something to this effect, "The only cost to you is \$4.75 for printing and handling costs of your Customers Checkbook"?

A. Well, sir, it was a telephone call and I don't remember the exact words.

Q. Is it possible that she used that language?

A. But it was something, though, to the effect that it included postage and printing costs for \$4.75.

Q. And following that did the party on the telephone tell you that "In all, you do receive over \$50 in useful values"?

(Testimony of Nancy Nozawa.)

A. No, she said \$60 worth of valuable merchandise.

Q. Did she say to you, "Now, your Checkbook will be delivered to you next week," or something to that effect?

A. Well, by that time I was so happy and excited, I don't remember if she said that or not.

Q. I see. Did she say, "You understand, when your mail [89] man brings your Customers Checkbook you pay him only \$4.75"?

A. No, I don't think she said that.

Q. You don't think she said that. Did she say, "The business men want and respect your patronage and we wish you a good time, so take advantage of these wonderful offers in your Honolulu Customers Checkbook"? A. No.

Q. She didn't say that? A. No.

Q. Did she say, "Thank you"?

A. I was excited. I don't remember whether she said "Good bye" or "Thank you."

Q. Probably she did say "Thank you" or "Good bye"?

A. I can't remember, because I was too excited.

Mr. Greenstein: No further questions.

The Court: Redirect?

Mr. Langa: No redirect examination.

The Court: You may step down, Mrs. Nozawa.

Mr. Langa: Mr. Holloway.

CLAYTON C. HOLLOWAY

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Langa): Would you please state for the record your name [90] and address?

A. Clayton Charles Holloway, 41 Dune Circle, Kailua.

Q. Now, Mr. Holloway, if I may call your attention to the early part of summer, May or June, do you recall receiving a telephone call from the Honolulu Customers Checkbook? A. I do.

Q. Do you know approximately when that was?

A. Approximately—I can't remember that.

The Court: Keep your voice up, Mr. Holloway, so we can all hear you.

The Witness: I can't remember the approximate date.

Q. (By Mr. Langa): It was about in the end of May or early June?

A. Before the summer started.

Q. Do you recall the substance of that telephone call?

A. Vaguely, I do. I remember that a woman was on the phone and she asked me my telephone number—I mean stated the number, and I said it was the correct number. And then she said that "If you answer—" — she said she was from the Honolulu Customers Checkbook, and she said, "If you answer some questions, the following question correctly, you will win over \$50 free gifts, merchandise." So then

(Testimony of Clayton C. Holloway.)

she asked me the question and the question was: Which is the second largest city on the Island of Oahu. And I said, [91] "Pearl City." And she said, "That is wrong," but she would give me another chance. So then she asked me in which hand did the Statue of Liberty hold the torch. And I said the left, and I was correct with that answer. And then she said that I had won over \$50 free merchandise and that she did state a few of the items that I was to receive in the book that would be mailed out through the mail, and it would be \$4.75 plus a small C.O.D. charge.

Q. Did you receive, then, something in the mail?

A. I received a slip of paper directing me to the postoffice here, and I went to the postoffice and paid the money and then received the book in return.

Q. I am showing you a Honolulu Customers Checkbook and a card, printed in red. Can you identify that?

A. Yes, I can. This is the merchandise for book that I received in the mail.

Mr. Langa: I see. Your Honor, I offer this in evidence.

Mr. Greenstein: No objection.

The Court: It will be received as exhibit number 8.

(The document referred to was received as Plaintiff's exhibit number 8 in evidence.)

Q. (By Mr. Langa): Mr. Holloway, on exhibit number 8, which is the Honolulu Customers Checkbook which you have just testified to, there is a sig-

(Testimony of Clayton C. Holloway.)

nature there that purports to be [92] your signature. Is it?

A. Yes, this is my signature.

Q. Which one is your signature?

A. The one on the card.

Q. The one on the card. And also the one on the book? Both of them? No. There is also a date there. Was that the date that you put your signature on the book?

A. I don't remember the exact date that I signed for the book.

Q. Do you recall how much you paid for the letter when you got it from the postoffice?

A. \$4.90.

Mr. Langa: I have no further questions.

Cross Examination

Q. (By Mr. Greenstein): Well, after you had concluded this phone conversation with this party from the Honolulu Customers Checkbook you expected to pay \$4.90, didn't you?

A. Well, the girl said at the end of the conversation that in order to receive the book there will be \$4.75 charge for the handling and printing of the book and a slight C.O.D. fee.

Q. Yes. And so you were apprised you would be charged the sum of \$4.90 for the book? [93]

A. Would you repeat that again?

Q. I will withdraw it and state it another way, sir. When the phone conversation was concluded, you expected to pay \$4.75 plus a little handling

(Testimony of Clayton C. Holloway.)

charge for the coupon book you were to receive, didn't you? A. I did.

Q. Yes. And did the coupon book include all the things you were told by phone you would receive?

A. I wasn't told over the phone of all the items in the book, only a very few of them.

Q. So, as a matter of fact, you received coupons covering more than the items you were informed about?

A. She said, the woman on the telephone said that she just stated a few of the items which were in the book, but she said there were many more besides that.

Q. Yes. And that was true, was it not?

A. That is correct.

Q. And she didn't question any items that were not covered by a coupon?

A. I don't remember.

Mr. Greenstein: No further questions.

The Court: Redirect?

Mr. Langa: No redirect examination.

The Court: You are excused, Mr. Holloway.

LIESELOTTE K. KAHOOKELE

called as [94] a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Langa): Would you please tell the jury your name and address?

(Testimony of Lieselotte K. Kahookele.)

A. My name is Lieselotte K. Kahookele, and we live in Schofield Barracks.

The Court: Spell the first name for the reporter.

The Witness: L-i-e-s-e-l-o-t-t-e K-a-h-o-o-k-e-l-e.

Q. (By Mr. Langa): Now, Mrs. Kahookele, I would like to call your attention to early June of this year or late May; do you recall receiving a telephone call from the Honolulu Customers Checkbook? A. Yes, I did.

Q. Do you remember what was said in the telephone call?

A. That I had received free gifts from the Honolulu Customers Service.

Q. Do you recall anything about a contest or anything of that—— A. No.

Q. All you recall now, then, is that you were to receive some free gifts?

A. If I answered a question. [95]

Q. Oh, I see. And then did they ask you a question? A. Yes.

Q. And what happened then?

A. She asked me the question, in which hand the Statue of Liberty holds the torch. And my answer was the left, which, after the conversation, I know it was wrong, but before it wasn't wrong.

Q. Well, what did they tell you on the telephone?

A. It must have been correct, the woman told me all about the free gifts.

Q. I see. Then subsequently did you receive any mail from the Honolulu Customers Checkbook?

(Testimony of Lieselotte K. Kahookele.)

A. Yes, I did, C.O.D.

Q. I am showing you a Honolulu Customers Checkbook and a Ray's Shell Service card. Have you seen those before? A. Yes, sir.

The Court: What is the answer?

The Witness: Yes.

Q. (By Mr. Langa): Is that the mail you received C.O.D.? A. Yes.

Mr. Langa: Your Honor, I offer this checkbook and card in evidence.

Mr. Greenstein: No objection.

The Court: They will be received as exhibit number 9. [96]

(The documents referred to were received as Plaintiff's exhibit number 9 in evidence.)

Mr. Langa: No further questions.

Cross Examination

Q. (By Mr. Greenstein): Mrs. Kahookele, the party that talked to you on the telephone from the Honolulu Customers Checkbook, did they say to you, "If you can answer the following question correctly, you will have the opportunity to receive a Customers Checkbook worth over \$50 in useful car services, entertainment tickets and free gifts?"

A. Yes.

Q. And wasn't that the form in which the question was asked of you when they opened up the conversation? A. Yes, it was.

Q. And then after they asked you the question about the Statue of Liberty, they told you you

(Testimony of Lieselotte K. Kahookele.)

would receive the following items, and mentioned the list of items; isn't that true? A. Yes.

Q. And they also told you that there would be a charge of \$4.75 for the coupons you would receive?

A. It was after they told me all the free gifts I was supposed to get free.

Q. Yes. [97]

A. I didn't have to buy anything with them.

Q. But my question is: After they gave you this list, *you* told you the coupon book would cost \$4.75, did they not? A. Yes, that is correct.

Q. And the coupon book reflected the things they were talking about that you would be entitled to, did it not? A. Yes.

Mr. Greenstein: No further questions.

The Court: Redirect?

Mr. Langa: No redirect.

The Court: You are excused.

ROBERT ENOMOTO

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Langa): Will you state for the record your full name and residence?

A. My name is Robert Enomoto, and I live at 45-521 Duncan Drive, Kaneohe.

Q. Now, Mr. Enomoto, calling your attention to the early part of June of this year, do you recall

(Testimony of Robert Enomoto.)

receiving a telephone call from the Honolulu Customers Checkbook? A. I did. [98]

Q. Do you recall the substance of that call?

A. Well, I was led to believe that——

The Court: Mr. Enomoto, the question is: Do you remember the substance of the call?

A. Oh, yes. Some parts.

Q. (By Mr. Langa): Some parts. Could you tell us those parts which you do remember?

A. Well, I remember answering the phone and this woman saying that she was from the Honolulu Customers Checkbook and she wanted me to answer a question, and if I did answer it correctly, I would receive merchandise worth over \$60.

Q. Then did she ask you the question?

A. Yes, she did.

Q. What happened then?

A. Well, she asked me the question. She asked me what was the second largest city in Honolulu. So I said "Wahiawa." And she said I was right. And she congratulated me and said that I would receive the checkbook through the mail, and I will have to pay a small fee on the book.

Q. Then subsequently did you receive some mail from the Honolulu Customers Checkbook?

A. Yes, I did.

Q. I show you a letter with your name on the front; is that the mail you received? [99]

A. Yes, I guess that is the one.

Q. Would you look inside and tell me if the con-

(Testimony of Robert Enomoto.)

tents of that letter are the same contents that were in it when you received it?

A. Yes, that is the one.

The Court: What is the answer?

The Witness: Yes.

Q. (By Mr. Langa): Excuse me. I take it except for this official card which came——

A. Yes. This didn't come with it.

Mr. Langa: Your Honor, I offer the envelope and its contents, except for that other card, which is only a notice of C.O.D. mail.

Mr. Greenstein: No. I suggest that it be part of the exhibit.

The Court: Very well. The envelope and its contents will be received as exhibit number 10.

(The documents referred to were received as Plaintiff's exhibit number 10 in evidence.)

Mr. Langa: However, I believe his testimony is that that one card was not in the envelope when he received it.

The Court: But it was a notice to appear to pick up the C.O.D.; is that correct?

Mr. Langa: That is right. It is the card the [100] postoffice uses to notify you of your mail. That is exhibit 9, your Honor?

The Court: Exhibit 10.

Q. (By Mr. Langa): Now, Mr. Enomoto, in exhibit 10, which is the letter you have just identified, there is a card printed in blue ink that says Date's Service Station? A. Yes.

Q. That was in the letter?

(Testimony of Robert Enomoto.)

A. Yes, sir, it came with the letter.

Q. Do you know who Mr. Date is?

A. Yes, I do.

Q. And you know where his service station is?

A. It is in Kailua.

Q. That is Mr. Thomas K. Date, is it not?

A. That is right.

Mr. Langa: If the Court please, there is an exhibit marked for identification, Plaintiff's exhibit number 3, as to which, I believe, now sufficient foundation has been laid, and I would like to re-offer it in evidence, the contract which Mr. Date brought to Court, proposed contract.

The Court: Is there any objection?

Mr. Greenstein: Yes, there is. We incorporate the objections heretofore made, and we also say it goes beyond the allegations of the indictment.

The Court: Objection on the ground and insufficient [101] foundation has been laid will be sustained.

Mr. Langa: I have no further questions from this witness.

The Court: Cross examine?

Cross Examination

Q. (By Mr. Greenstein): How much did you pay for your Honolulu Customers Checkbook?

A. \$4.75.

Q. And you were told, you expected to pay that amount when you were through with this phone conversation?

A. I did.

Mr. Greenstein: No further questions.

Mr. Langa: No redirect.

The Court: You are excused, Mr. Enomoto.

Mr. Langa: Mr. Jacobson.

ELMER L. JACOBSON

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Langa): Will you state your name and occupation, please?

A. My name is Elmer L. Jacobson, Postal Inspector with headquarters at Honolulu.

Q. Now, Mr. Jacobson, in the course of your official [102] duties have you conducted an investigation of the instant case? A. Yes, I have.

Q. In the course of your investigation have you examined a number of letters for the purpose of making an analysis of the letters? A. Yes.

Q. What was the purpose of the analysis?

A. The purpose of the analysis was to determine the contents of the various mailings made in the name of Honolulu Customers Checkbook to compare that with the Honolulu postoffice record.

Q. And specifically what mail did you examine?

A. I examined a representative number of Customers Checkbooks and envelope turned in to me by complainants, compared them with the Honolulu postoffice record.

Q. Now, from your examination of those letters did you determine that they were all alike?

(Testimony of Elmer L. Jacobson.)

A. No, they varied as to contents at different dates of mailing.

Q. I see. Could you state just briefly the nature of the variations?

Mr. Greenstein: I am going to object to that line as being immaterial to the issues.

The Court: Which ones? [103]

Mr. Greenstein: We have five counts here. We have the complainants' testimony.

The Court: What is the purpose of this, Mr. Langa?

Mr. Langa: The purpose, your Honor, is just to give a picture of the plan, of the type of mailing that was involved in the overall promotion. It will appear that not each of the checkbooks in evidence is like each of the others, and this is to explain the differences.

The Court: The objection is overruled.

Q. (By Mr. Langa): Would you proceed?

A. Yes. There were six different types of mailings, as far as I could determine. The first type of mailing began——

Mr. Greenstein: Just a minute. Your Honor, may I be permitted to conduct a Voir Dire examination to see whether or not this inspection was according to due process of law and by what authority?

Mr. Langa: I think that has already been shown, your Honor. He inspected letters that had been brought to him by complainants who had received the letters in the mail.

(Testimony of Elmer L. Jacobson.)

The Court: Those are the letters you are talking about?

The Witness: That is right.

The Court: Yes. Your request for Voir Dire examination at this time is denied.

The Witness: Beginning June 2nd the C.O.D. charges [104] were \$3.95 plus a 15 cent money order fee, and the contents of those mailings consisted only of George's Shell Service card. Beginning on June 5th the C.O.D. charges were still \$3.95, but the 15 cents money order fee and contents consisted of George's Shell Card plus a Customers coupon book. Beginning on June 7th the charges were \$3.95 plus 15 cents money order fee. The contents consisted of a Ray's Shell Service card plus a coupon book. Beginning on June 10th the mailings were—consisted of a coupon book plus Ray's Shell Service card, and the price was raised, then, to \$4.75 plus 15 cent money order fee. The coupons were identical to the prior ones mailed with Ray's Service, but, except, that there was only one Al Karasick coupon for a general admission ticket, whereas the prior mailings had two. The next mailings began on June 14th, and consisted of Ray's Shell Service card and coupon book, but added to the coupon book were six coupons from the CHA 3 Bowl and one coupon from the Stauffer System. Beginning on June 17th, when there were 193 articles mailed, according to the postoffice records, the contents consisted of Date's card plus a coupon book, with C.O.D. charge of \$4.75 plus 15 cents money order fee.

(Testimony of Elmer L. Jacobson.)

Q. (By Mr. Lange): Now, I take it by inference from what you have said that you examined the postoffice C.O.D. records in addition to the letters themselves?

A. Yes. Those records consisted of pages from the [105] firm, what we call a firm mailing book. Those pages were completed by the mailer or representative of the mailer, turned in with the articles to the Honolulu postoffice, and then receipted for by a postal employee.

Q. Do you have those records with you?

A. I do.

Mr. Langa: If your Honor please, may I——

Mr. Greenstein: We object as far as the materiality is concerned, your Honor. We submit that these records do not——

The Court: They have not been offered.

Mr. Greenstein: I am sorry. I am not going to look at them. I have seen them.

Mr. Langa: These records show a mailing——

Mr. Greenstein: The records will speak for themselves. I object to the characterization without them in evidence.

The Court: Just a minute. Yes. The question has not been asked, for one thing. And I prefer to allow counsel to ask the question before interposing an objection.

Mr. Greenstein: My objection was that counsel is making a speech instead of making an offer.

The Court: Just a minute. You make your objection in proper form at the proper time.

(Testimony of Elmer L. Jacobson.)

Q. (By Mr. Lange): Mr. Jacobson, do these records [106] show the addresses of the letters?

A. They do.

Mr. Greenstein: I had an objection, but he answered. I will wait.

Q. (By Mr. Langa): I believe you have already explained that these are brought by the mailer to the sender with the mail that is sent; is that correct? A. That is the normal procedure, yes.

Mr. Langa: Your Honor, I want to offer these. Your Honor, I do offer these records to show the mailing of a letter to Margaret Sorrell.

The Court: Covered in count 4 of the indictment?

Mr. Langa: The count, I believe, is 4.

The Court: It is 4. Is that the only purpose you are offering it?

Mr. Langa: That is the only purpose that I want them for.

The Court: Does the record show such a mailing?

Mr. Langa: The record does not yet show such a mailing. Margaret Sorrell is not available as a witness.

The Court: No. The question is does the record before you show a mailing to Margaret Sorrell, 2721 Papiolani Blvd. on or about June 16, 1958?

Mr. Langa: Money order number 5145.

The Court: Money order? [107]

Mr. Langa: Well, it is C.O.D. number.

The Court: Where is Margaret Sorrell?

(Testimony of Elmer L. Jacobson.)

Mr. Langa: She is on the mainland at the present time. I am not sure just where. Perhaps Mr. Jacobson knows.

The Witness: I don't know the exact point.

The Court: Have you examined that record?

Mr. Greenstein: Yes, I have, your Honor.

The Court: What do you have to say as to the offer?

Mr. Greenstein: I say there is not sufficient foundation for tying it into count 4. The fact that the letter may have been mailed doesn't tie it up to the gravamen of the offense, which would be the purported prior dealings between the Defendants and the party named in the count.

Mr. Langa: I think counsel misconstrues the indictment, your Honor.

The Court: Well, I will handle it this way. Show the record to Mr. Jacobson and he may read that portion into the record, or read what it says.

The Witness: On postoffice form 3877-A postmarked June 16, 1958, which is a record I obtained from the Honolulu postoffice, I find on line 8 the handwritten entries of a number of articles, 5145, name of addressee, street and postoffice address, Margaret Sorrell, '2721 Kapiolani Blvd. And another handwriting entry A. Hare, H-a-r-e, in the right [108] hand column.

The Court: Is that an official record of the post-office department?

The Witness: It is, your Honor, official original record.

(Testimony of Elmer L. Jacobson.)

The Court: You obtained that from the files from the Postmaster?

The Witness: That is correct.

The Court: I think it is time for our morning recess. Ladies and gentlemen of the jury, you will be excused for a ten minute recess. Is Mr. Jacobson your last witness?

Mr. Langa: He is, your Honor.

The Court: As far as you know. Well, the Court will take a ten minute recess.

(Recess.)

The Court: The record will show the jury is present, the Defendants and their counsel. Have you concluded your direct examination?

Mr. Langa: I have just a few more questions, your Honor.

The Court: Very well.

Q. (By Mr. Langa): Now, Mr. Jacobson, I am not sure whether we covered this or not, but to make it clear, the official records which you have testified from are records of mailings by whom? [109]

A. The Honolulu Customers Checkbook, I believe that is the name that appears on each page, or appearing on each page.

Q. Is it possible from an inspection of the official records to determine or to find out how many items all together have been mailed by the Honolulu Customers Checkbook?

A. Yes. It was and it is possible.

Q. Did you so inspect the records to find that out?
A. I did.

(Testimony of Elmer L. Jacobson.)

Q. How many?

A. They run serially here beginning with number 1 on June 2nd and up to 5,589 on June 17th. But I find there is some duplication of numbers, apparently inadvertent, some skipping, my personal count is 4,208 pieces mailed.

Q. When you say "Personal count," that means that there may be a plus or minus by a few?

A. I could have made a mistake, more or less, yes.

Q. Now, Mr. Jacobson, were you at the preliminary hearing before Commissioner White in this case?

A. Yes, I was.

Q. And at that preliminary hearing did you hear either of the Defendants testify?

Mr. Greenstein: I am going to object to that line as being highly improper. If he is going to refer to any testimony, if there was a transcript, that would be the best [110] evidence.

The Court: The objection is overruled.

The Witness: Yes, I recall the testimony of Defendant Lemon.

Q. (By Mr. Langa): Of Lemon?

A. Yes.

Q. Do you recall whether or not he testified regarding the ownership and management of Honolulu Customers Checkbook?

Mr. Greenstein: We will stipulate to that.

The Court: That the Defendants were the owners and operators of the Honolulu Customers Checkbook.

(Testimony of Elmer L. Jacobson.)

Mr. Greenstein: That we have never denied.

The Court: That is in the record, ladies and gentlemen of the jury. When counsel stipulate to a fact, that is taken as conclusively proved and you are bound to accept it as a fact.

Mr. Langa: I have no further questions.

The Court: Cross examine?

Cross Examination

Q. (By Mr. Greenstein): When a piece of mail, an article of mail, sir, is presented for C.O.D. processing, whose property do you consider it?

A. Any piece of mail matter, as I understand it, remains the property of the sender until it is correctly [111] delivered to the addressee.

Q. You have testified that according to your record 4,280 pieces were submitted for C.O.D. handling by the Honolulu Customers Checkbook?

A. 4,208.

Q. Oh. I may have misunderstood. Now, before you take those pieces does Uncle Sam collect a C.O.D. fee or charge?

A. Yes, that is right.

Q. And what is that charge?

A. It depends on the size of the C.O.D. charge to be collected. The fee is 30 cents in all these instances here that I know of.

Q. 30 cents? A. C.O.D. fee, yes.

Q. Isn't it 36 cents? A. 30 cents.

Q. 30 cents?

(Testimony of Elmer L. Jacobson.)

A. That is right. I might explain to counsel that the postage is in addition, six cents.

Q. In connection with all these items that are represented by this exhibit, being exhibit number 6, the Honolulu Customers Checkbook has paid 36 cents, 30 cents being the C.O.D. charge, and, I think, six cents postage.

A. I believe some had only 33 cents on, but the lawful [112] postage on all of them.

Q. And in connection with the C.O.D. envelopes, referring to, for example, Plaintiff's exhibit number 10, where it says "Due the sender," \$4.75 would be transmitted to the Honolulu Customers Checkbook, I take it? A. That is correct.

Q. And the 15 cent money order, who got that?

A. That covered the fee on the money order which transmits the \$4.75.

Q. In other words, that, likewise, would go to the Postal Department?

A. The Treasury Department.

Q. The Treasury Department. Now, when was it, sir, that you commenced opening up the mail that belonged to Honolulu Customers Checkbook?

A. I have never opened up a single item. I have never opened a single envelope of mail belonging to the Honolulu Customers Checkbook or anyone else.

Q. You have not. Do I understand you have not opened up any of these envelopes that are in evidence? A. That is correct.

Q. You have not opened them up. When you were talking about making inspections at various

(Testimony of Elmer L. Jacobson.)

dates in June, what kind of inspections were you making?

A. I examined the material that was turned in to me [113] by complainants.

Q. I see. They had already been opened?

A. I examined the material turned in to me by the complainants, the persons who contacted my office.

Q. When you were talking about June 17th or June 10th and June 14th examination, you were referring to examination of envelopes that were brought in to you by customers?

A. That is correct.

Q. Is that right? Now, when did you start—withdraw and reframe. These 1,800 or so pieces of mail that are in evidence as part of exhibit 6, over how long a period were they accumulated by the Postal Department?

A. I believe some accumulated since the first date of mailing, June 2nd.

Q. Didn't the Postal Department carry the mail?

A. It did. We can't force them on an addressee. If they refuse them, we hold them a prescribed length of time.

Q. That is what I am trying to find out. I am trying to characterize just what Plaintiff's exhibit 6 represents. Do they represent mailings which went out and were refused, brought back to the Postoffice Department?

A. Some of these do, yes. They would represent

(Testimony of Elmer L. Jacobson.)

several types, some that were mailed on the 17th which yet were not delivered, some mailed from June 2nd on which they were refused, some, perhaps, where the addressee had moved; [114] in other words, those that we weren't able to deliver.

Q. Now, as I understand it, the seizure of these was made by you June 17th?

A. No, I didn't seize them. The Marshal seized them.

Q. The Marshal? A. That's right.

Q. They were seized on what date; was it June 17th, do you know?

A. I don't know the date. I filed application for a search warrant on the 17th. It was a bit later that the Marshal seized them.

Q. Was June 17th the last date of any mailing, if you know?

A. As far as the records show, the 17th was the last.

Q. What do your records show as to the number of pieces that were submitted for processing on the 17th?

A. 193 pieces were listed on form 3877 bearing Honolulu postmark of June 17th.

Q. And will you refresh my recollection and tell us again how many pieces of mail are in exhibit six?

A. I don't know exactly of my own knowledge.

The Court: 1,874.

The Witness: The Marshal testified.

The Court: The Marshal testified 1,874.

Mr. Greenstein: Thank you. [115]

(Testimony of Elmer L. Jacobson.)

Q. Would it be fair, then, to say, Mr. Jacobson, that approximately over 1,600 of these articles represent returns or improper deliveries, improper addressees?

A. I am sorry, I didn't hear the question.

Q. Let's put it this way. We have established that the June 17th mailings did not go out?

A. That is right, as far as I know.

Q. Was that the only date that was held up?

A. As far as I know, yes.

Q. So that of the 1,874, 1,681 would be articles which were either refused or misaddressed?

A. Right. I should correct my testimony. Some of the 17th were delivered, did go out.

Q. Well, then, that would make the number even more; in other words, about 80 or 90% of the articles mailed that are in this Plaintiff's exhibit 6 were either returned or improperly addressed; would that be fair?

A. Returned, improperly addressed, refused.

Q. Or refused? A. Yes.

Mr. Greenstein: I have no further questions.

Mr. Langa: I have no redirect examination.

The Court: You may step down, Mr. Jacobson.

Mr. Langa: If the Court please, before I rest, it occurred to me that the bags are locked. I have a key [116] which the Court may want to use if the jury wants to get in to them. Could I leave that with the Clerk? It is not evidence, but it is a tool.

The Court: The key will be kept in the custody of the Clerk subject to the orders of the Court.

Mr. Greenstein: In that connection we could probably stipulate as to the contents, without waiving our objections to the introduction of the evidence, as far as having come out of the bags.

The Court: Have you ever seen the inside of the pouches? I think you might take a look. Supposing you open them, Mr. Clerk, and we will see, and the jury can see what is inside of them.

(The Clerk opens mail pouch.)

The Court: Does that pouch indicate that it contains similar packs of envelopes such as you have in your hand?

Mr. Langa: There is a slip of paper that says P-S-O. This one has P-S-S.

Mr. Greenstein: They are just alphabetical designations of the first letter of the last name.

The Court: Are you satisfied from your inspection of that one pouch, Mr. Greenstein, that all of the pouches contain similar envelopes and contents?

Mr. Greenstein: Yes, I am, your Honor. [117]

The Court: And you will stipulate, then, that there are in the pouches 1,874 envelopes and contents, and the contents are the checkbooks and the cards?

Mr. Greenstein: It may be so stipulated.

The Court: Very well. Is that agreeable to you, Mr. Langa?

Mr. Langa: Well, to tell you the truth, I am somewhat skeptical about the Marshal's testimony on the number of letters. I am not an expert on judging the letters in mailbags, but I don't anticipate the jury would want to count them.

The Court: The testimony is not contradicted, and it is up to the jury to weigh the Marshal's testimony and not for you or for me. We will leave it that way, ladies and gentlemen of the jury, but if, during your deliberations, you desire to inspect more carefully the contents of the bags, they will be made available to you.

Mr. Langa: Your Honor, I have no further questions and no further evidence to put on.

Mr. Greenstein: The government rests?

The Court: Do you wish to make an opening statement at this time?

Mr. Greenstein: I wish to make a motion.

The Court: Very well. You may make your motion.

Mr. Greenstein: I wish to make a motion for [118] judgment of acquittal, and respectfully ask to argue it at this time.

The Court: State the grounds of your motion.

Mr. Greenstein: Yes, that the government has failed to establish by the preponderance required the necessary elements of offenses charged.

The Court: Those are the grounds?

Mr. Greenstein: Yes.

The Court: I do not desire to have argument on the motion. I have watched the taking of evidence in the light of the allegations contained in the indictment, and I will reserve ruling on your motion.

Mr. Greenstein: Thank you. May we have just one moment, your Honor.

The Court: Yes.

Mr. Greenstein: Mr. Youn, please.

ANTONE YOUN

called as a witness on behalf of the Defendants,
being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Greenstein): Will you please state your name, address and occupation?

A. Antone Youn, 359-D Olohana, owner of Tony's T.V. and Radio Service. [119]

Q. Mr. Youn, do you know the Defendants or any of them?

A. Yes, sir. I met them over at Larry Vincente's Restaurant.

Q. Have you had any business dealings with the Defendants? A. Yes, I did.

Q. Would you tell the Court and jury what the nature of your business dealings were with them?

A. Well, I happened to go to lunch over at Larry Vincente's and they were there. And they approached me about the Customers Checkbook. And I felt that I needed a little more promotion in my business, so I accepted.

Q. Did you sign an agreement with them?

A. Yes, sir, I did.

Q. And is this the agreement that you signed?

A. Yes, sir.

Mr. Greenstein: We offer this agreement in evidence.

Mr. Langa: No objection.

The Court: It will be received as exhibit K.

(The document referred to was received in evidence as Defendant's exhibit K.)

(Testimony of Antone Youn.)

Q. (By Mr. Greenstein): Now, what was the purpose that you had in entering into this arrangement with the [120] Honolulu Customers Check-book?

A. To promote more business in my T.V. company. That is the only interest I had.

Q. You thought it was a pretty good idea.

A. I still feel it is a pretty good idea.

Q. And by this agreement, you agreed to honor 5,000 coupons? A. Right, yes, sir.

Q. Were you interested in the manner in which the Defendants would distribute your coupons?

A. Well, I was in a hurry and I didn't ask them how they were going to sell the books. They told me they were going to sell the books. That is all I was interested in.

Q. You didn't care how they would sell them?

A. No, I didn't ask them how they were going to sell them.

Q. You say that you were happy with the arrangement with the Defendants?

A. At the time, yes.

Mr. Greenstein: Your witness.

Cross Examination

Q. (By Mr. Langa): Mr. Youn, where did you say your shop is?

A. 207 South Beretania Street.

Q. South Beretania. You make service calls over the [121] entire Honolulu area?

A. No, I don't.

(Testimony of Antone Youn.)

Q. How far do you go from your shop on a service call?

A. I will say as far as Aiea and as far as Sandy Beach.

Q. Your agreement here has written in ballpoint pen "Free, one T.V. service call." Is that what you expected to be presented with coupons to redeem for; you expected to be presented with coupons that would be redeemed for one free T.V. service call?

A. That is right.

Q. Would you redeem those coupons for anybody living in Kailua?

A. Well, the opportunity never arose. I didn't get any calls from the country so I cannot make a comment on that.

Q. What was your intention at the time you entered into this contract?

A. To promote business.

Q. Yes. But what was your intention as to the meaning of that free T.V. service call coupon; did you mean anywhere on the Island?

A. I forget whether they told me about all around the Island. I took it for granted it was just in the vicinity of Honolulu. [122]

Q. Did you get any telephone calls from Kaneohe in regard to this coupon book?

A. I don't recall. But if I had a call from Kaneohe, the service charge out there is about \$10, so I would have to explain to the customer that it would be an additional \$5 to go there.

Q. In addition to the coupon?

(Testimony of Antone Youn.)

A. So I don't think they would call me. They would rather call someone in Kaneohe.

Mr. Langa: No further questions.

Mr. Greenstein: No redirect.

The Court: You may step down, Mr. Youn.

LARRY VINCENTE

called as a witness on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Greenstein): Please state your name, address and occupation?

A. I am Larry Vincente, Producer and Booking Agent. My address is 109 University Avenue.

Q. What was your business or occupation in May 1958?

A. I was general manager and president, Larry Vincente's Restaurant.

Q. Where was that located?

A. 1900 Kalagaua Avenue. [123]

Q. Do you know the Defendants in this case?

A. Yes.

Q. Did you have any business dealings with them in connection with a Honolulu Customers Checkbook?

A. No, just that.

Q. I mean you have had dealings with them in connection with the Customers Checkbook?

A. Yes.

Q. May I show you a document entitled "Agree-

(Testimony of Larry Vincente.)

ment" and ask you if this is the agreement you entered into with the Defendants? A. Yes.

Mr. Greenstein: I believe there is no objection.

Mr. Langa: No objection.

The Court: The agreement will be received as exhibit L.

(The document referred to was received in evidence as Defendants' exhibit L.)

Q. (By Mr. Greenstein): By this agreement you indicated your company was agreeable to honoring 10,000 coupons for free pizza, I believe?

A. Yes.

Q. And you were ready to honor that at all times, were you not? A. Yes. [124]

Mr. Greenstein: Your witness.

Cross Examination

Q. (By Mr. Langa): Now, to be more specific, Mr. Vincente, on exhibit L your agreement to honor coupons for one free pizza was limited to one per table, was it? A. Yes.

Q. And also it was not good Saturdays, Sundays and Holidays? A. Yes.

Q. Was it good for take-out orders?

A. No. If they had their—if some people didn't know they were not supposed to take it out, I just let them take it out, just to educate them to eat more pizza.

Mr. Langa: I have no further questions.

Mr. Greenstein: I have no redirect examination, your Honor.

The Court: You are excused, Mr. Vincente.

LYLE G. SPRINKLE

called as a witness on behalf of the Defendants,
being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Greenstein): Will you please state your name, address and occupation? [125]

A. Lyle G. Sprinkle, Senior, and I am in the bowling business.

Q. Where is your place of business?

A. Well, I have more than one. My main place of business is CHA 3 Bowl.

Q. Do you know the Defendants in this case, Jack Lemon and Marty de Bruin?

A. I have met Jack Lemon. The other gentleman I never knew until I came to Court, that I remember.

Q. Have you ever had any business dealings with Honolulu Customers Checkbook?

A. I did.

Q. What was the extent of your dealings with them, sir?

A. Well, Mr. Conley, a fellow that I had business dealings with before, brought this Customers Checkbook, a sample of it out to my place of business one night, and asked me if I would be interested in placing some coupons in it.

Q. Well, did you enter into an agreement with Honolulu Customers Checkbook? A. I did.

Q. What was that agreement?

A. That I would honor 60,000 coupons for one free game of bowling with no strings attached.

(Testimony of Lyle G. Sprinkle.)

Q. And were you happy to have made that arrangement, [126] sir?

A. Yes, I was happy to make that arrangement.

Q. And were you agreeable to honoring all coupons presented to you?

A. I not only was, I still am.

Q. Were you interested or concerned with the method of distribution that the Honolulu Customers Checkbook would employ in getting the coupons out?

A. To my knowledge, I didn't inquire. I figured that was their end of the promotion. I was merely to take up the coupons and honor them.

Q. Is it fair to say you didn't care——

A. I didn't care.

Q. ——what medium they employed?

A. No. As far as I am concerned, they just told me they were going to sell them. I didn't know how they were going to sell them. I didn't care.

Mr. Greenstein: Thank you. Your witness.

Cross Examination

Q. (By Mr. Langa): Did you enter into a written contract? A. I did.

Q. Do you still have it?

A. I do not. I imagine they have a copy of it.

Mr. Greenstein: May we have the Court's indulgence? [127] You can't produce it?

Q. (By Mr. Langa): Do you recall the date of the contract?

A. No, I don't recall the date of it. I do know

(Testimony of Lyle G. Sprinkle.)

that it was only three days after I signed the contract that they started printing these books.

Q. With your coupons in it?

A. My coupons in it.

Q. In other words, three days after you signed the contract your coupons first appeared in the book?

A. No. Mr. Conley told me three days later that they had started to print the book. I was anxious to get them out, and that is what I understood.

Q. You mean to say all books that were ever printed had your coupons in them?

A. Well, that I don't know. I know there is supposed to be 10,000 books with six coupons in a book.

Q. You are referring to books that you have your coupons in? A. That is right.

Q. I see. Well, was it in June that you entered into the contract?

A. Frankly, I don't know.

Q. Well, let's see. The coupons that were in the books, did you see any of the coupons? [128]

A. Yes.

Q. Were they in accord with your contract?

A. Yes.

Q. Then did your contract provide that the coupons would be limited to only one ticket per person per day? A. One ticket per person per day.

Q. Then it is not really true what you said in your direct testimony that there were no strings attached?

(Testimony of Lyle G. Sprinkle.)

A. I said I offered 60,000 free games with no strings attached.

Q. Except that they could use only one coupon per day?

A. That is what it says on the coupon. I don't think that is any string.

Q. Just so long as we understand it. Do you know offhand, Mr. Sprinkle, how many of these coupons you have redeemed?

A. I haven't redeemed a single solitary coupon, for the simple reason that people called me up on the phone to see if I will honor the coupons. I said I would be only too glad.

Mr. Langa: But they never have come out there. Thank you. That is all.

Mr. Greenstein: No redirect.

The Court: You are excused, Mr. Sprinkle. [129]

ALFRED STACY

called as a witness on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Greenstein): Will you please state your name, address and occupation?

A. Alfred Stacy, 1024 Green Street, occupation salesman.

Q. Have you ever been engaged either as owner or employee of a business of selling coupons to the public in Honolulu?

A. Yes, I have.

Q. Have you yourself been so engaged?

(Testimony of Alfred Stacy.)

A. Yes, I have.

Q. When and where was that?

A. In Kailua in 1954; in Honolulu in '52 and '56.

Q. Were any of these activities that you owned and operated yourself?

A. I was a partner in a corporation that owned one.

Q. And where did that operate, sir?

A. In Kailua and one in Honolulu.

Q. About how many business firms—how long have you been in Honolulu, sir?

A. Sixteen and a half years. [130]

Q. How many business firms, if you know, have been engaged in the operation of a business similar to the one that is in issue here in this case?

A. Five from my personal knowledge.

Q. And you have been associated with how many of them? A. Four.

Q. And you were in Court this morning?

A. I beg your pardon?

Q. You were sitting in the Courtroom this morning? A. Yes, I was.

Q. Are you generally familiar with the method of operation that was employed by the Defendants in this case in selling and promoting their Customers Checkbook? A. Yes, I am.

Q. And did these other business activities with respect to which you have prior hereto been associated follow the same general line?

A. The same general line.

(Testimony of Alfred Stacy.)

Q. And have any of these other business activities of yours been arrested for this type of conduct in and about Honolulu? A. No.

Mr. Greenstein: Your witness.

Mr. Langa: I have no questions, your Honor.

The Court: You are excused, Mr. Stacy.

ALMA THOMAS

called as a witness on behalf of the Defendants, being first duly sworn, testified as follows:

The Court: Will you try to keep your voice up so the Court and jury can hear you?

Direct Examination

Q. (By Mr. Greenstein): Will you please state your name and address?

A. Mrs. Alma Thomas, secretary. I live at 1918 Democrat Street.

Q. Now, by whom were you employed in May or June of this year?

A. By Mr. de Bruin and Mr. Lemon, Honolulu Customers Checkbook.

Q. And where was their office located?

A. 204 Merchandise Mart Building.

Q. In downtown Honolulu? A. Yes.

Q. Now, what was your particular job?

A. I was in charge of the girls.

Q. Well, would you amplify that; just what did you do with respect to other girl employees?

A. I instructed the new employees as to how they should do their duty. I assigned them a place

(Testimony of Alma Thomas.)

on the telephones to work at and I gave them each a salestalk and told [132] them that they were supposed to read it over the phone to the people and that they weren't supposed to add anything to that salestalk.

Q. Now, I show you what has been marked as Plaintiff's exhibit number 5—it might be 5-A and 5-B, and ask if these were the salestalks with respect to which you have just testified?

A. Yes, they were.

Q. I direct your attention to the telephone number which appears in the upper right hand corner of these exhibits, and ask you if you would explain to the Court and jury the significance of that telephone number?

A. It says here, "For call backs give this telephone number, 68079." These were for people who had questions about this checkbook, about where they could go to redeem their coupons and any other questions that they might want to ask. And that telephone was located in the very next room where Mr. Lemon and Mr. de Bruin could answer these calls and help the people.

Q. And I take it that this particular phone was situated not in the same room as the telephone room the girls were using? A. No.

Q. Now, did you yourself ever answer or sit by that telephone, being number 68079? [133]

A. Yes, I have.

Q. Now, prior to the publicity which appeared

(Testimony of Alma Thomas.)

in connection with this case tell the Court and jury whether you received many complaints?

A. Well, before the publicity started there weren't very many, and most of them were just limited to people who had had a checkbook before and were kind of skeptical of it. And then they talked to Mr. Lemon and Mr. de Bruin or myself about it, and we explained it over the phone, or else they would come into the office and look at it.

Q. Now, to the best of your knowledge, Mrs. Thomas, were any of the young ladies who used the telephone on behalf of Honolulu Customers Checkbook authorized to indicate to the person on the other end of the phone that this was a contest?

A. No, they weren't supposed to say anything that wasn't on the salestalk, and that salestalk doesn't contain the word "Contest" in it.

Mr. Greenstein: Your witness.

Cross Examination

Q. (By Mr. Langa): Was the script that the girls used always exactly as in the exhibit which you just identified?

A. To my knowledge it was.

Q. No changes of any sort at any time? [134]

A. I don't think so, because I started a week after the checkbook started. So to my knowledge they had those salestalks. That is the one I used when I started.

Q. Now, from your answer would I be right in inferring that prior to the time you started you

(Testimony of Alma Thomas.)

don't know, but subsequent to that time there was never any changing? A. That is right.

Q. You say you started a week after the telephone room started? A. I think so.

Q. You think so?

A. Well, because my cousin said she started on the first day and I started on Monday of the following week.

Q. Do you recall what week that was?

A. I am sorry, I don't.

Q. Was it in May or June?

A. I am pretty sure it was in June.

Q. In June. And was the—I notice that the exhibit refers to a number of free items of merchandise and services. Was that list exactly the same all the time you were there?

A. Let's see. I think it was.

Q. Always the same? A. Yes.

Q. Would you like to look at exhibits 5-A and 5-B to refresh your recollection? [135]

A. This one here was the one I used when I first started, because I made a few calls when I first started. And this other one here, it is different.

Q. Do you recall whose service station card you were selling at the time you first started?

A. I think it was George's Shell.

Q. George's Shell? A. Yes.

Q. Was that before or after it was George's Shell with the coupon books?

A. I beg your pardon?

Q. Was it George's Shell Service alone at the

(Testimony of Alma Thomas.)

time you started or was the coupon book with it when you started?

A. The coupon book was with it.

Q. Did any one ever ask you how to get his money back? A. Yes, they did.

Q. How did you handle those requests?

A. Well, I directed them to Mr. Lemon or Mr. de Bruin, because I am not authorized to give any refunds.

Q. And how did they handle those requests?

A. Most of the time they gave refunds.

Q. Did you see them give refunds?

A. Yes, I have.

Q. By check? [136] A. Yes.

Q. In the amount of \$4.90?

A. I really couldn't tell you how much the check was for, but I think it was.

Q. Well, now, if you think so, why is it that you are not willing to say so?

A. Because I have seen them give the checks, but I never took it away from the person and said, "Let me see it."

Q. You mean you never saw the check?

A. I seen them give it to a person, yes.

Q. But you never read the check?

A. I never read it.

Mr. Langa: No further questions.

Mr. Greenstein: No redirect, your Honor.

The Court: You are excused, Miss Thomas.

Mr. Greenstein: May I suggest that this would be a convenient time to recess for lunch.

The Court: Do you have any idea, Mr. Greenstein, as to how much longer your case will take?

Mr. Greenstein: I am sure we will conclude this afternoon.

The Court: Have you prepared any special instructions?

Mr. Greenstein: I will try to get them ready this afternoon, sir. [137]

The Court: Well, what I am trying to get at is whether there is any possibility of the case going to the jury this afternoon? I don't want to submit it to them at 4:30 or 5:00 o'clock.

Mr. Greenstein: I would rather think—depending on this afternoon—I would rather think it might be tomorrow morning.

The Court: Ladies and gentlemen of the jury, again before excusing you, you are instructed not to discuss this case with anyone or allow no one to discuss it with you, avoid reading or hearing anything about it and form no opinion about it. You are excused until 2:00 o'clock this afternoon. Court will recess until 2:00 this afternoon.

(An adjournment was here taken until 2:00 p.m. of this day.) [138]

Honolulu, T. H.

December 2, 1958, 2:00 P.M.

The Court: The record will show the jury is present, the Defendants and their counsel. Call your next witness, please.

Mr. Greenstein: Yes, sir.

BETTY MITCHELL

called as a witness on behalf of the Defendants, having been previously duly sworn, testified as follows:

The Court: You were sworn yesterday, were you not?

The Witness: Yes.

The Court: The oath you took yesterday is still binding upon you.

Direct Examination

Q. (By Mr. Greenstein): Would you please state your name for the record again?

A. Betty Mitchell.

Q. And you are the same person who testified yesterday? A. Yes.

Q. Now, Mrs. Mitchell, what is the name of your place of business, please?

A. Surf and Shore Store.

Q. And what is the address?

A. 2401 Kalakaua. [139]

Q. Have you had any business dealings with the Honolulu Customers Checkbook?

A. Yes.

Q. Did you agree that a coupon covering your establishment should be placed in this book?

A. Yes.

Q. Now, in connection with the representative of the Honolulu Customers Checkbook negotiating with you for an agreement relative to the use of the coupons, did they indicate to you what means they

(Testimony of Betty Mitchell.)

would employ in getting these coupons distributed to the public? A. A telephone crew.

Q. They said they would employ a telephone crew? A. Yes.

Mr. Greenstein: May I have this marked?

The Clerk: Defendant's M for identification.

(The document referred to was received as Defendant's exhibit M for identification.)

The Court: What is that again?

The Clerk: M for identification.

Q. (By Mr. Greenstein): I take it you signed an agreement with Honolulu Customers Checkbook?

A. Yes.

Q. I will show you a coupon which is marked Defendant's M for identification and ask you if that is the coupon that [140] refers to your place of business? A. Yes, that is it.

Q. And I take it you are happy with the arrangement permitting the use of these coupons to the Honolulu public? A. Yes.

Mr. Greenstein: Your Honor, during the noon recess I dictated instructions, and in connection with doing that I left all my files on my desk, which is going to be returned to me in 15 minutes, in which is included the agreement which I will refer to, which I want to offer in evidence when the papers are returned to me. For the purpose right now I would like to offer into evidence this particular coupon.

The Court: There being no objection it will be received as exhibit M.

(Testimony of Betty Mitchell.)

(The document referred to was received as Defendant's exhibit M in evidence.)

Mr. Greenstein: And subject to offering into evidence the agreement referred to, I will tender the witness to the prosecution.

Mr. Langa: If the Court please, might I suggest that perhaps Mrs. Mitchell may have her copy with her.

The Witness: No, I don't find it. I have lost it.

Cross Examination

Q. (By Mr. Langa): Mrs. Mitchell, what specifically would you be prepared to do in redeeming one of these coupons?

A. We would give a customer a dollar off if they purchased \$10. It is the same as a percent discount.

Q. I see. And I believe this coupon has an expiration date, does it, December 1, 1958. As of that date how many of these coupons had you redeemed? A. I never saw any.

Q. You never saw any? A. No.

Mr. Langa: No further questions.

The Court: Is there any question in your mind, Mr. Langa about the agreement entered into with the witness?

Mr. Langa: No. I have no question. I am sure she entered one, probably, just like all the others, calling for a coupon of this sort.

The Court: There is no reason for keeping Mrs. Mitchell here?

Mr. Langa: No, I don't see any.

The Court: Very well. You are excused.

The Witness: Thank you.

SAM PRICE

called as a witness on behalf of the Defendants,
being first duly sworn, testified as follows: [142]

Direct Examination

Q. (By Mr. Greenstein): Would you please state your name, address and occupation?

A. My name is Sam Price. I live at 337-A Keapau Street, Kailua. I am executive director of the Hawaiian Cerebral Palsy Association.

Q. How long have you been associated with cerebral palsy?

A. I have been associated with cerebral palsy in the island for around a year and a half or two years.

Q. Now, prior to that time, Mr. Price, what were your other businesses or occupations?

A. I was on the mainland and I was a public relations consultant with Eagle Lion studios, and as a free lance public relations man.

Q. And how long were you employed in that capacity?

A. I wasn't employed. I was self-employed. I was freelancing there and I was in that business for about ten years.

Q. Now, are you familiar with a coupon business on the mainland during your previous experience?

(Testimony of Sam Price.)

A. The first time that I became familiar with the coupon business, which I believe is similar to what has taken place here in the islands, I believe was the year—I am not certain about these years, but it was close to, probably, [143] 1945, '44, back about that time, a man by the name of Harry Schooler, he was the manager of the Casino Gardens, and the Casino Gardens was going to fail in business, because they didn't have enough business, and they were looking for a way to improve their business. So they hit on some different ideas for everybody to come in, they would let somebody come in free and what have you, and in the conversation they finally hit on, "Why don't we do it for the whole pier, and we will put out a coupon book of some kind, and by letting one person go free, the other person paid, and we could stimulate business."

And I was a public relations consultant and they came to me with this plan that they had, and after we got through tossing it around, we decided to extend it not only to the amusement center at Ocean Park but to include all of the businesses in the Los Angeles area who had something to give away and who seemed to be needing a stimuli for business. And we went around and got such people as dance studios and gas stations and all these different kinds of business that separately were advertising, that as a stimuli they would like to give something away. And this was based on a book that they put out. Most people like to get something for noth-

(Testimony of Sam Price.)

ing, and if you offer them something for nothing, why, that acts as a stimulant to them to come in and maybe buy something else. And it is an accepted way of promoting business. And so we [144] went around and got these contracts from these different people, and we were very successful in our first presentation of it.

Now, we did send these coupon books in the mail. We went to the post office anticipating that in all these something for nothing deals, you never really get something for nothing. What it amounts to is a sales stimulant. You are going to get a certain number of customers that are not happy with it. And usually these are not business men who entered into the contracts, because they go to their attorneys and they examine the thing and they realize that it is the usual form of stimulus that they have been using, but now it is all being packaged in one package. So they have no objection to it. They are usually very happy with it, as long as they are in the coupon book. But some customers sometimes object to it. And so we went to the post office. They told us, not as an official ruling, but they told us that in their opinion if we delivered the books and that if our contracts were legal, they couldn't see anything there that was wrong. They didn't tell us it wasn't wrong, but they couldn't at the outset of it see anything that was wrong.

We went on the radio and we advertised it and we went on the telephone and everything. And Mr. Schooler took in about a quarter of a million dol-

(Testimony of Sam Price.)

lars, about \$100,000 net profit the first time they did this.

I was going to tell you one thing that was very [145] interesting about it is when he repeated it the following year, he needed quite an investment, but he lost money. The public didn't seem to go for this type of thing twice in a row. Apparently a lot of people thought that they were going to get the whole thing for nothing. When they went down they found out that most of these people were using it for a sales stimulus. And there is never something for nothing, whether it is a stamp book or whatever it is in the advertising field. In any business you can't just give things away. There is a hidden way to pay for the cost involved. And so a lot of people when they found out there were these things, they wouldn't go for it the second time. But, nevertheless, we went into it as an honest intention. I mean there was no intent to take anything away from anybody. It was just that we thought we hit upon a method of selling which was superior to having the individual business do it. That was our intention in the promotion.

Q. Mr. Price, how long were you engaged in working with people using the coupon method of sales promotion?

A. Well, my only association at that time was directly with Mr. Schooler. I was a public relations consultant. I had nothing to do with the sales or anything. I merely helped him work out ways of contacting businesses and what have you. Later

(Testimony of Sam Price.)

when I was in Alaska I had some people up there and they were going into the same business. They came to me because [146] I knew something about how to contact businesses and set up the contracts involved between the company which put out the book and the business, and asked me something about it and I advised them for a fee as to how to go about that. And their's was something similar, again. They contacted all the bars in the town and they sold the coupon books on the base, and if you bought a coupon you would go into the bar and get a free drink, and that would act as a stimulus for you to buy some more drinks and that was the way that was presented. Each one of these things are presented a little differently.

The biggest project that was ever gone into along this line I was not connected with. But I understand and I have read, since Mr. Schooler went into it, some time around 1951, that somebody out in Alabama went into the thing on a national basis and it was a multi-million dollar project. They had national advertising on television on radio and everything. I don't know the details of their project, but I understand the same formula was used and I think that there were a lot of complaints and there were a lot of people again who were dissatisfied when they found out they didn't get something for nothing. Now, I think that is where your complaint usually comes. A lot of people are quite naive.

The Court: Mr. Price, it is very interesting, but

(Testimony of Sam Price.)

if you would just confine your answer to the question [147] we will get along faster.

The Witness: I thought I was trying to bring out the answer.

Q. (By Mr. Greenstein): Mr. Price, to the best of your knowledge is the coupon method of sales promotion still going on in the mainland?

A. To the best of my knowledge every once in a while somebody will go into a city and work it, yes. I think the statistics would show, you would find that throughout the United States at least 20 or 30 times a year in different large cities some variation of selling of the coupons is used. I would say it was used about like stamps are used in stores as a method of getting people to buy merchandise, and I believe you will find the pros and cons for it. Some people are for it and some against it. And I think if you go into a city that had just been worked you would find a lot of objections. They don't like it.

Mr. Greenstein: Your witness.

Cross Examination

Q. (By Mr. Langa): Now, I gather, Mr. Price, from your rather enlightening discussion of how coupon plans work that essentially what you need for a coupon plan is for some merchant to agree to honor coupons and some suckers who will agree to buy them, is that it? [148]

A. Well, I wouldn't say that—I wouldn't use the word "suckers." I would say this: that advertising

(Testimony of Sam Price.)

agencies—I mean we have different ways of looking at things—advertising agencies are continually making studies of ways to act as an incentive for people to buy during slow buying areas. And in order for a coupon book or things to go over, you have to find a group of merchants in a certain area that are suffering from a lack of business, and at this particular time they are open to any plan that will bring anybody into the store in order that they can show their merchandise, and they are willing to give something away in order to stimulate these people to buy something else. Now, the Thrifty Drug Stores in 1945—

Q. Yes. You are getting—

A. I was going to say where they came from.

Q. That is all right.

A. I don't think the word "suckers"—unless you are speaking of the general public as such.

Q. What I want to find out, I think you have partially answered, first you have to have the merchants, don't you? A. You do, yes.

Q. They have to agree to honor the coupons?

A. Yes, they do.

Q. Now, what kind of merchants usually in your experience—you had some, I gather, some extended experience, [149] plus reading and other—

A. Yes.

Q. —material. So that you are fairly familiar with the system? A. Right.

Q. The idea. Are you also familiar with—have

(Testimony of Sam Price.)

you done any reading in publications of the Better Business Bureau on the very same subject?

A. I know something of their attitude towards them.

Q. Would you agree with them that service station operators are favorite objects of the operators of these things, as far as getting merchandise is concerned?

A. We always had trouble with service station operators for this reason: that when a man goes into the coupon deal he has to be able to measure very carefully whether the services he is going to give is going to take up so much of his time it is going to cost him money. If a service station operator is not careful, he is liable to give away more than he can afford to give away, and therefore he is one of the ones who might object to the contract. And he usually won't go into a second one.

Q. Would you say, then, that that is probably why the defendants had to change service station operators so many times in this particular coupon plan?

A. It might be. Might be, yes. [150]

Q. You just said you know the Better Business Bureau's attitude on these things.

A. Well, I would say this: that I think if a person were to go to the Better Business Bureau in advance, they would be told not to do it, because my experience with the Better Business Bureau has been that anything to disturb the status quo of business that is new that might bring a complaint, regardless of whether it is legitimate or not, they

(Testimony of Sam Price.)

are against it because it puts pressure on the Better Business Bureau.

Q. What do you mean by "legitimate"?

A. Well, whenever you go into a coupon deal with business men, there are those that hold with coupons and those that don't. So where you are stimulating business——

Q. No. Stop. I asked you what do you mean by "legitimate"? Be responsive.

A. Well, I don't understand what you mean. I mean by "legitimate" something that is ethical and right and which is legal and accepted, that there is nothing, no law against it.

Q. That there is no law against it?

A. I would say there is no law against the thing, then you would consider it legitimate, like stamps. There is a lot of pros and cons as to whether they should be used or not. But I think it has proven it is a legitimate thing, so [151] therefore you can't stop somebody who wants to from doing the thing. It is an enterprise.

Q. You mean it has been proven that there is no law?

A. Against stamps? Well, I don't know whether it has been proven, but there seems to be a lot of entrepreneurs that use the stamps. I don't know, personally, the law, sir.

Q. Now, the reason for the complaint, you say, is that people discovered too late that you don't really get something for nothing; is that a fair——

A. You don't get it all for nothing. You get

(Testimony of Sam Price.)

what usually is advertised, but they are impulsive. This is a question of impulsive buying. They think, they are under the impression that they are going to go somewhere and not have to pay anything. It is a lot like the little tickets you see left around the theaters that says "Free" on it.

Mr. Langa: No further questions.

Mr. Greenstein: No redirect examination.

The Court: You are excused Mr. Price.

Mr. Greenstein: Subject and reserving our right to produce into evidence the agreement referred to in connection with the prior witness, the Defendants rest.

The Court: Any rebuttal, Mr. Langa?

Mr. Langa: May we have a moment, please? We have no rebuttal evidence, your Honor.

The Court: How many of you ladies and gentlemen [152] have sat on trial juries before? Half of you. How many are from outside islands? I believe there are two. Yes.

The evidence is all in with the exception of the agreement between the Defendants and Surf and Shore. We always have a problem of settling the instructions of law. Sometimes counsel say that will take 15 or 20 minutes and it drags into two hours. Other times it is done inside of half an hour. And then argument will take some time. So under the circumstances I am not going to try to submit this case to you this afternoon. You might get it about 5:00 o'clock, and that isn't a very good time to start your deliberations. So we will start a

little earlier tomorrow morning. Then the case will get in your hands by before noon.

It is now more important than ever before that you not discuss this case with anyone or allow anyone to discuss it with you. You are instructed not to read or hear anything about it and form no opinions about it. You are excused until 9:30 tomorrow morning.

(Here the jury leaves the Courtroom.)

The Court: I would suggest to counsel that when you get your instructions that you go over them yourselves and see where you are in agreement, and then we will go in my Chambers and settle those where there is not agreement. I think, Mr. Greenstein, that agreement, which will be exhibit N, should be offered and received in the presence [153] of the jury.

Mr. Greenstein: Yes, your Honor.

The Court: So we will do that at 9:30 tomorrow morning. I am reluctant to submit this case to a comparatively new jury at about 4:30 in the afternoon. I think it is fair to them to start fresh tomorrow morning. So I will meet with you gentlemen whenever you are ready in my Chambers.

(Recess.)

(The following proceedings took place in Chambers outside the presence of the jury.)

The Court: Let the record show that we have gone through the instructions submitted by the Plaintiff and the Defendants. Plaintiff's numbers 1, 2, 3, 4, will be given with the approval of the Defendants, and the Plaintiff's number 5 will be

given as modified with the approval of the Defendants, the modification consisting of deleting the second sentence.

Defendants' instruction number 1 will be given, number 2 has been withdrawn, numbers 3, 4, 5, 6, will all be given, either verbatim or in substance, there being no objections to the instructions. Thank you, gentlemen.

(An adjournment was here taken for the day.) [154]

Honolulu, T. H.

December 3, 1958, 9:30 A.M.

(Case called.)

The Court: Are you ready, gentlemen?

Mr. Langa: Yes, your Honor.

Mr. Greenstein: Ready, your Honor.

The Court: The record will show the jury is present, the Defendants and their counsel.

I think there is one matter to be introduced.

Mr. Greenstein: Yes. May we at this time, subject to our reservation yesterday, offer in evidence the agreement between Surf and Shore and Customers Checkbook?

Mr. Langa: No objection.

The Court: It will be received as exhibit N.

(The document referred to was received as Defendants' exhibit N in evidence.)

The Court: Are you ready to make your opening argument, Mr. Langa?

Mr. Langa: I am.

(Argument by Mr. Langa.)

(Argument by Mr. Greenstein.)

(Argument by Mr. Langa.) [155]

* * * * *

[Endorsed]: Filed May 6, 1959.

[Endorsed]: No. 16468. United States Court of Appeals for the Ninth Circuit. Jack A. Lemon and Martin de Bruin, Appellants, vs. United States of America, Appellee. Transcript of the Record. Appeal from the United States District Court for the District of Hawaii.

Filed: May 11, 1959.

Docketed: May 15, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 16468

JACK A. LEMON and MARTIN de BRUIN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANTS INTEND TO RELY

Appellants hereby state that they intend to rely upon the following points on appeal:

I.

The trial court erred in denying the motion for a judgment of acquittal made by appellants at the close of the Government's case and renewed following verdict.

II.

The trial court erred in failing to rule and find the evidence adduced insufficient to support a verdict of guilty.

Dated: Honolulu, Hawaii, this 1st day of May, 1959.

/s/ HYMAN M. GREENSTEIN,
Attorney for Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 11, 1959. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF THE RECORD TO BE
PRINTED ON APPEAL

Appellants hereby designate for inclusion in the printed record on appeal the following:

1. Indictment.
2. Transcript of proceedings, page 1 to page 155, line 22.
3. Verdict.
4. Motion in arrest of judgment.
5. Motion for acquittal.
6. Motion for new trial.
7. Clerk's minutes as to ruling on motions in arrest of judgment, for acquittal and new trial.
8. Judgment and sentence.
9. Notice of Appeal.
10. Bonds on Appeal.

* * * * *

12. Designation of the contents of the record on appeal.

13. Statement of points on which Appellants intend to rely.

14. This designation.

Dated: Honolulu, Hawaii, this 1st day of May, 1959.

/s/ HYMAN M. GREENSTEIN,
Attorney for Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 11, 1959. Paul P. O'Brien, Clerk.

No. 16,468

IN THE
United States Court of Appeals
For the Ninth Circuit

JACK A. LEMON and MARTIN de BRUIN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States
for the District of Hawaii.

APPELLANTS' OPENING BRIEF.

HYMAN M. GREENSTEIN,
400 South Beretania Street,
Honolulu, Hawaii,
Attorney for Appellants.

GREENSTEIN & FRANKLIN,
400 South Beretania Street,
Honolulu, Hawaii,
Of Counsel.

FILED

OCT 28 1949

PAUL P. O'BRIEN, Clerk

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Specification of Error No. 1

The trial court erred in denying the motion for a judgment of acquittal made by appellants at the close of the Government's case and renewed following verdict.

Specification of Error No. 2

The trial court erred in failing to rule and find the evidence adduced insufficient to support a verdict of guilty.

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No. 16,468

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JACK A. LEMON and MARTIN de BRUIN,
Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States
for the District of Hawaii.

APPELLANTS' OPENING BRIEF.

Appellants, defendants in a criminal action, have appealed from the final judgment, decision and sentence of the District Court of the United States for the District of Hawaii.

STATEMENT OF JURISDICTION.

By indictment, appellants were charged in the United States District Court for the District of Hawaii in that they did "devise and intend to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent

pretenses, representations and promises . . . for the purpose of executing the said scheme and artifice, and attempting to do so, did place and cause to be placed in an authorized depository for mail matter a letter from the Honolulu Customers Checkbook addressed to . . .” in violation of Section 1341, Title 18, United States Code.

Following a trial by jury, verdict, judgment and sentence, appellant prosecuted an appeal to this Court.

The jurisdiction of this Honorable Court to review said final judgment of a United States District Court for the District of Hawaii is sustained and provided for by Sections 1291 and 1294 of Title 28, United States Code.

STATEMENT OF THE CASE.

The indictment in five counts charges that appellants from May 21, 1958 to June 17, 1958 devised and intended to devise a scheme to defraud by false representations certain persons and did use the United States mails for the purpose of executing said scheme. (T-3-9.)

Appellants solicited various businessmen and concerns to enter into agreements whereby appellants would distribute certain coupons to the general public entitling the distributees to certain services which their clients obligated themselves to perform. (T-38, 39, 48, 49, 52, 54, 56, 60, 61, 64, 65, 127, 131, 132.) Distribution of said coupons was by telephonic conversa-

tion, preceded by an offer to the public to participate in a question-answering contest. Upon receipt of a correct answer, said public was informed that he was the recipient of merchandise and services of a certain value. (T-34, 35, 69, 70, 71, 93, 102, 103, 106, 109.) Concurrently, each member of the public so contacted was informed that he would have to pay the postman \$4.75 for printing and handling costs. (T-70, 71.) (P's Ex. 5-A and 5-B.) Numerous members of the public were so contacted and some of them received "Honolulu Customers Checkbooks." (T-94, 103, 107, 110.) (P's Exs. 7, 8, 9, 10.) Apparently, there were no positive misrepresentations. (P's Ex. 5-A and 5-B.) There is no dispute that the United States Post Office was utilized to effect transfer of the "checkbooks" and the fee involved.

Pursuant to pleas of Not Guilty by appellants to each count of the charge, trial was had before jury and verdict of guilty returned as to each appellant on every count. (T-9.)

At the close of the Government's case, appellants moved for judgment of acquittal, ruling on which was reserved by the Honorable District Court. (T-126.) After verdict, motions in arrest of judgment, acquittal, and for new trial were made and denied. (T-10, 11, 12.) On January 19, 1959, by an Order of Judgment and Commitment, the Honorable District Court adjudged each appellant guilty on all counts and sentenced each of them to three months imprisonment and \$500.00 fine on each count. Sentences of imprisonment on each of five counts were to run currently

with each other and payment of the sum of \$500.00 on Count I was to constitute payment of the fine on each of the remaining counts. (T-12, 13, 14, 15, 16.)

SPECIFICATION OF ERRORS RELIED UPON.

1. The trial Court erred in denying the motion for a judgment of acquittal made by appellants at the close of the Government's case and renewed following verdict.

2. The trial Court erred in failing to rule and find the evidence adduced insufficient to support a verdict of guilty.

ARGUMENT.

Both specifications involve the basic question of whether the jury could find the defendants guilty as charged on the evidence adduced. It is submitted that it could not do so.

The indictment alleging violation of Section 1341, Title 18, United States Code, in five counts as to each appellant, particularized as part of the "scheme and artifice to defraud" solicitation of persons to be defrauded by telephone, use of question and answer upon contact as inducement for the "person to be defrauded" to order a Honolulu Customers Checkbook, failure to inform said person that "in order to obtain certain of the merchandise and services 'received' it would be necessary to purchase other merchandise, tickets, or services, failure to mention use of telephone

solicitation in dealings with merchants and businessmen; the making of 'oral representations,' well knowing the representations would be and were false and fraudulent when made.'" (T-3-9.)

Apparently the government's theory is that a fraudulent scheme was concocted by appellants to defraud the members of the general public contacted out of the \$4.70 or so purporting to represent expenditures incident to the preparation and distribution of the "checkbooks". It is undisputed that the United States mail was used as a medium of distributing the checkbooks and hence if the evidence adduced at the trial fairly shows a scheme to defraud, then the verdict of the jury and the judgment and sentence of the trial Court must be upheld. The sole question remaining is whether such evidence was presented at the trial below.

Although there is an allegation in the indictment that false and fraudulent oral representations were made over the telephone (T-4, 5) there was no evidence that any representations were made, unless the failure to inform the public about the necessity of incurring expenditures as a condition of cashing certain of the coupons in the checkbook can be construed as such. Apparently it is the government's theory that a fraudulent scheme can be reasonably and fairly inferred from failure to inform the public of the conditional nature of some of the coupons, from the use of the question and answer form of inducing the public to purchase checkbooks, from the use of the telephone as a means of contact, and from the failure to

inform their clients that telephones would be used to help effect distribution of the coupons. That the government is proceeding on a scheme to defraud without reliance on any fraudulent representations, reliances or promises is apparent from the proof offered on Count Four of the Indictment, where the only evidence tying in the person to be defrauded, a certain Margaret Sorrell, is the record of the post office department of the mailing of a letter from the Honolulu Customers Checkbook to the said Margaret Sorrell. (T-116, 117, 118.) When counsel for appellants stated that the gravamen of the offense would be "the purported prior dealings between the Defendants and the party named in the count", counsel for the government stated that "I think counsel misconstrues the indictment, your Honor". (T-117.)

The first group of witnesses called by the government, consisting of businessmen desiring to advertise their services, gave testimony relative to the medium to be utilized by appellants in contacting the general public. Only a few of them had something to say about that subject though with some there might have been indicated some vaguely felt antipathy toward use of the telephones. Mr. George Oka stated that they (the appellants) "were supposed to go out and sell them either house to house or . . ." (T-32.) The contract between Mr. Oka and appellants provided that "Honolulu Customers Checkbook agrees to pay all of the advertising costs on radio, T.V. and newspapers, and the advertiser pays no costs . . ." (D's Ex. A, T-38, 39.) Defendants' Exhibit "A" was the standard

form utilized by appellants. Mr. Raymond Muramoto testified that promotion was supposed to be by radio, television and the newspapers and that nothing was said about telephone and house to house selling. (T-47.) Grace Stubebaker testified that “. . . it would be general advertising, T.V. and so forth, in a very general manner”. (T-50.) Mr. Al Karasick testified that everything was according to the contract. (T-55, 56.) Satoshi Furuya testified “that they will sell it for . . . by house to house campaign”. (T-59.) Thomas Higa testified that he didn’t know whether anything was said about telephone solicitation. (T-63.) One government witness, Betty Mitchell, testified that appellants indicated to her that a “telephone crew” would be employed. (T-144.) Mr. Antone Youn testified that he was not interested in the manner the books were distributed. (T-128.) Mr. Larry Vincente was not asked that particular question, either by appellants or by the government. (T-130, 131.) Mr. Lyle G. Sprinkle testified that he didn’t inquire and “figured that was their end of the promotion”. (T-133.)

Whatever might be said as to whether adequate proof has been adduced that representations were made with subscribing merchants that every media would be utilized except by telephone, clearly the state of evidence is unsatisfactory as indicating part of the appellants’ scheme to defraud. Assuming that such representations tended to prove a scheme to defraud checkbook purchasers, a fair summary of the evidence adduced on that point is that one or two were

fairly sure that other media were to be utilized while one was sure that a "telephone crew" would be employed. The greater number either did not remember or did not deem the matter of any importance. It would seem that insofar as this point is concerned, the government is making "much ado about nothing".

The other points contended for by the government as showing a scheme to defraud involved use of the telephone to contact purchasers, use of the question and answer technique at the inception of contact, and failure to inform potential purchasers that some of the coupons required some expenditures.

Why use of the telephone instead of other media of contact would tend to show a fraudulent scheme is difficult to conceive. The best that can be said for it is that by such method the potential purchasers would have no prior information as to the conditions attached to some of the coupons. The short answer to that is that such condition would hold true only for a short period of time. It would hardly be reasonable that the appellants intended to contact only the five purchasers named in the indictment. In fact the evidence is that 1,874 C.O.D. letters were seized by the United States Marshal. (T-84.) This being so, assuming that the appellants were men of ordinary perception, it is reasonable to assume that what did later happen insofar as publicity given in the newspapers and Better Business Bureau releases was within their contemplation at the inception of their program. (T-42, 43.) Further, there was evidence that the Honolulu Checkbook scheme was intended to be continued

for a considerable period as indicated by the number of coupons that advertisers agreed to honor. (T-39, 48, 51, 60, 65, 128, 131, 132.) The lowest number agreed to be honored was 5,000 and the highest was 60,000. Such evidence fairly shows that appellants, as men of ordinary perception, must have contemplated extensive publicity to be given their project eventually.

So far as the question and answer technique utilized by appellants the evidence fairly shows that it was calculated to eliminate few, if any, contestants. Clearly it was not intended to reward highly informed persons. If appellants are deemed to be legitimate salesmen, such technique would neither be considered novel nor illegal in the selling profession. However, if it is apparent that the technique used was a transparent blind, then it could not have deceived any except the most gullible. The evidence fails to disclose that anyone contacted by appellants were lacking in an appreciation of the rudimentary facts of life. Apparently the government's theory is that such technique was the sheerest sham and was part of appellants' scheme to deceive. This, in turn, requires a belief by appellants that the general public, at least in Honolulu, was composed of gullible souls. The government's theory requires not only that Honolulu be made up of fools but that the appellants were unaware that their ruse was likely to be detected.

After answers to questions were correctly given, information was offered to prospective purchasers to the effect that they were entitled to certain enumer-

ated free services and merchandise and some others. In addition, they were informed that the services and merchandise had a certain value and that the "check-book" would cost them \$4.75 or so. (T-70.) Apparently there were no positive misrepresentations made. However, the purchasers were not informed that certain services or merchandise were required to be purchased before some of the coupons could be utilized. Other coupons, however, were unconditional and required no further expenditures from checkbook purchasers.

Research of counsel has not disclosed one case in point, involving prosecution under Title 18, Sec. 1341, U.S.C., and predecessor statutes. General statements abound as to the meaning to be given language contained in said section. It has been stated, for example, that there need be no proof of common law deceit. 41 A.J. 781, Post Office, Sec. 124. However, whatever may not be required, it is certain that an intent to defraud, or what amounts thereto, must be satisfactorily shown. 41 A.J. *ibid.* And if the evidence is consistent with innocence as well as guilt, a motion for directed verdict should be granted. *Ridenour v. U. S.*, 14 F. 2d 888 (1926); *Gold v. U. S.*, 36 F. 2d 16 (1929); *McClintock v. U. S.*, 60 F. 2d 839 (1932). Further, so far as our research shows, the vast majority of cases under said Sec. 1341 and predecessor statutes involve charges of false representations. This is not to mean that a "fraudulent scheme" may not be inferred merely from a lack thereof but is a strong

factor to be considered in whether there was or was not a scheme to defraud.

To show a scheme to defraud, the government contends that enough can be inferred from failure to disclose the conditions attached to some of the coupons, use of the question and answer device, and having the advertising businessmen understand that some media other than telephones would be used. The first two are admitted but the state of facts is unsatisfactory as to the last. From these facts we are asked to believe that a scheme was formed in the appellants' minds to extort money from the general public. Certainly a trier of fact can suspect that what happened was pursuant to a formed purpose to defraud. But he can just as easily imagine that such was not the case. It is undoubtedly true that appellants intended to profit from their activities. That is no crime. Assuming that profit making was their principal motive, surely as reasonable men, they would have preferred to make it legally than otherwise. If the services and merchandise offered to the public were all unconditional, surely there would have been no cry of fraud, even with the use of the question and answer technique and telephone. And the proof is that some, if not most, of said services and merchandise were offered unconditionally. Would the fact that they were, to some extent, conditional upon other purchases make that much of a difference? Not per se. Such inference must assume that appellants contemplated just such situation as did occur at the inception of their scheme and that it was

their formed purpose not to disclose to the public the conditional nature of some of the coupons. Other inferences are just as compelling, if not more so. The first is that appellants did not give the matter a thought. The second is that if they thought of it, they did not believe it wrong to fail to disclose, particularly if what the public received amounted to the \$50.00 or so represented. The "sales-pitch" as delivered to the public takes up two pages of the transcript. (T-69-71.) To reveal all the conditions would take up more time than already necessary and in view of the small amount charged could have been deemed a luxury. Surely no one contends that every sale requires that full disclosure be made of every detail and condition and exaggerations have been permitted. *Faulkner v. U. S.*, 157 F. 840 (1907); *Eastman v. Armstrong-Byrd Music Co.*, 212 F. 662 (1914). It is stated:

"It has been held that mere 'puffing' or exaggeration of qualities, usefulness, opportunities, or value of an article of commerce, where the purchaser gets the article intended to be purchased and the value of the article is measured by the price paid, do not constitute the false representations, promises, etc., denounced by the statute."

41 A.J. 783 *ibid*.

Another fact militating against the government's theory was that appellants' telephone number was made available to the public contacted. The testimony is that some members of the public not only talked to appellants over the phone but came in to see them

and, in at least one instance, refund made. (T-138, 139, 140, 141.) (P's Ex. No. 5.) It is more than strange that such an arrangement should be made part of a scheme to defraud.

It is respectfully submitted that the most the government has done to sustain its contention of a scheme to defraud is a strained inference of such scheme, amounting to hardly more than a suspicion, practically irreconcilable with most of the facts. It has urged significance to activities innocuous in themselves by suggesting that they could have been part of a sinister scheme. It would not have to go far before every activity of every person becomes suspect, a result hardly to be hoped for. The conclusion is irresistible that prosecution here was begun not because the fairly provable facts showed guilt under the said Section 1341 but because what appellants did was unpopular with the newspapers, the Better Business Bureau and the public. Under the facts not only was innocence as consistent as guilt but innocence was the only logical inference and the Court erred in not granting judgment of acquittal at the close of the government's case, judgment of acquittal after verdict, and in not granting appellants' motion for new trial.

CONCLUSION.

Appellants therefore respectfully submit that the judgment against them should be reversed.

Dated, Honolulu, Hawaii,
October 15, 1959.

HYMAN M. GREENSTEIN,
Attorney for Appellants.

GREENSTEIN & FRANKLIN,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

Chapter 61—Mail Fraud, Title 18, United States Code

Section 1341. Frauds and swindles

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.” June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139, Sec. 34, 63 Stat. 94.

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JACK A. LEMON and MARTIN de BRUIN,	}
<i>Appellants,</i>	

vs.

UNITED STATES OF AMERICA,	}
<i>Appellee.</i>	

On Appeal from the United States District Court for the
District of Hawaii in Criminal No. 11,279.

APPELLEE'S ANSWERING BRIEF.

LOUIS B. BLISSARD,

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UNITED STATES OF AMERICA,
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**On Appeal from the United States District Court for the
District of Hawaii in Criminal No. 11,279.**

APPELLEE'S ANSWERING BRIEF.

STATEMENT OF THE CASE.

Appellants were charged with devising an intending to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises and with using the mails for the purpose of executing said scheme and artifice and attempting to do so.

Appellants state in their opening brief, at page 5:

“... It is undisputed that the United States mail was used as a medium of distributing the check-books and hence if the evidence adduced at the trial fairly shows a scheme to defraud, then the verdict of the jury and the judgment and sentence

of the trial Court must be upheld. The sole question remaining is whether such evidence was presented at the trial below.”

ARGUMENT.

THE EVIDENCE WAS SUFFICIENT TO GO TO THE JURY AND IS SUFFICIENT TO SUSTAIN THE VERDICT.

Inasmuch as the same basic question is involved, both specifications of error will be considered together.

There is no limit to the ingenuity of the human mind in formulating schemes to defraud. In *Wells v. Zenz* (1927), 83 Cal. App. 137, 256 Pac. 484, 485, the California District Court of Appeal stated:

“Fraud is a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to get an advantage over another. No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling, and unfair ways by which another is deceived.”

It is submitted that, considering the evidence in the light most favorable to the prosecution (*Buford v. United States* (November 2, 1959), 9th Cir., Advance Sheets, No. 16,405) the evidence adduced fairly shows a scheme by appellants to defraud. The scheme in this case was based on a simple proposition: to create false impressions and to thereby extract a few dollars from many individual members of the public. The basic idea itself is surrounded by an aura of dishonesty.

It was stipulated that appellants were the owners and operators of "Honolulu Customers Checkbook". (R. 119, 120.)

The first step in the scheme was to obtain from merchants agreements that they would honor a certain number of cards or coupons which would be distributed by appellants. Such agreements were obtained from George Oka, owner and operator of George's Shell Service (Plaintiff's Exhibit 2, R. 34), Raymond Y. Muramoto, operator of Ray's Shell Service (Defendants' Exhibit B, R. 48), Grace Studebaker, manager of Arthur Murray Studio (Defendants' Exhibit D, R. 52), Al Karasick, sports promoter (Plaintiff's Exhibit 4, R. 54), and Satoshi Furuya, manager of the Nippon Theater (Defendants' Exhibit G, R. 60), among others. It is obvious from the coupons in evidence that such agreements were obtained from others as well.

The agreements in evidence provided that Customers Checkbook would pay all of the advertising costs on radio, television and in newspapers. Appellants did not state in the agreements in evidence that the telephone would be used for solicitation.¹ Oka testified he did not know that appellants were going to use the telephone until customers told him of it and that it made a difference in his mind whether he had been told that they were going to do so. (R. 38.) Muramoto testified that de Bruin did not say anything about selling the Customers Checkbook by

¹See footnote 3 post.

telephone (R. 47), Studebaker testified that appellants did not tell her that they would use telephone solicitation and that she cared whether the telephone was used because she did her own telephone solicitation (R. 52), and Furuya testified that appellants told him that the checkbook was to be sold by house to house campaign and that they did not say anything to him about telephone solicitation. (R. 59, 60.)

Thus, appellants misled said merchants into believing that the telephone was not to be used in distributing the cards and coupon books.

The second step in the scheme was to prepare a sales pitch designed to mislead, and hire girls to telephone persons listed in the telephone directory.

The evidence shows that Plaintiff's Exhibit No. 1 was given over the telephone. (R. 32, 33.) In that sales pitch, the caller stated: "This is George's Shell Service calling . . ." (R. 34.) This was untrue. Oka, the owner of George's Shell Service, testified that none of his employees read this script on the telephone and that he had never authorized anybody to read it on the telephone. (R. 36.)

The sales pitches given by telephone (Plaintiff's Exhibits Nos. 1, 5, 5A, R. 33, 34, 68, 71), were calculated to convey false impressions to the persons called. In stating to the persons called: "If you can answer the following question correctly, you will have the opportunity to receive a George's Shell Service card worth over \$50.00 in useful car service," (R. 34) and "If you can answer the following question cor-

rectly you will have the opportunity to receive a customer's checkbook worth over \$50.00 in useful car services, entertainment, tickets and free gifts," (R. 69), then listing certain "free" items and stating that they were only a few of the many wonderful values offered (R. 70), it was intended to convey the false impressions that because of his ability to answer a question correctly the person called thereby became entitled to free items and that all of the items were free without the necessity of the person's having to spend any money to obtain them.

The deception was accomplished. Nancy Nozawa testified that she was told it was a contest and that she would receive some valuable merchandise. (R. 93, 96.) She also testified that she was told that she had won some things. (R. 99.) Clayton C. Holloway testified that he was told he would win over \$50.00 free gifts and merchandise and that he had won them. (R. 103.) Lieselotte K. Kahookele testified that she was told that she had received free gifts (R. 106) and that she did not have to buy anything. (R. 108.) Robert Enomoto testified that he was told that if he answered the question correctly he would receive merchandise worth over \$60.00. (R. 109.)

The evidence shows, without dispute, that many persons, including those hereinabove named, purchased the cards and books sent to them C.O.D. by appellants. (R. 94, 95, 103, 107, 109, 110, 112, 113, 114, 122.)

It was represented that the person called would receive 75 free gallons of gasoline. (Plaintiff's Exhibit No. 1, R. 35.) The card so provided. (Defend-

ants' Exhibit A, R. 38.) The George's Shell Service card was good for three months.² The buyer of the card was entitled to five free gallons of gasoline with every 48 gallons purchased. To get 75 gallons free, he would have to buy 48 gallons 15 times in three months, a total of 720 gallons. To this must be added 70 gallons. The last five gallons could remain in the tank. Therefore, within three months he would have to use 790 gallons. To do so, a driver whose car averages 13 miles per gallon would have to drive 10,270 miles in three months, an average of approximately 114 miles per day. Very few drivers in California average 10,270 miles in three months. This Court can take judicial notice that the island of Oahu, on which Honolulu is located, is 42½ miles long and 31½ miles wide at its widest point. (*Davis v. United States* (1950), 9th Cir., 185 Fed. (2d) 938, 944; *Kishan Singh v. Carr* (1937), 9th Cir., 88 Fed. (2d) 672, 675; Coast and Geodetic Survey Chart No. 4110.) It is apparent that an ordinary driver would average considerably less than 114 miles per day on the island of Oahu.

The Stauffer System coupon provides for \$7.00 in free treatments and a professional figure analysis. Ramona Arkin, manager of the Stauffer Salon, testified that they always offer one free trial and figure analysis (R. 27) and that ordinarily one treatment would be \$3.50. (R. 30.) The Arthur Murray coupon provides for two free dance lessons or \$15.00 credit on original course. Grace Studebaker, manager of the

²See footnote 3 post.

Arthur Murray Studio, testified that anyone who comes into the studio gets a half-hour free lesson, dance analysis. (R. 51.) The Surf & Shore coupon provides for \$1.00 credit on any purchase over \$10.00. Betty Mitchell, the operator of the Surf & Shore Shop, testified that they always give \$1.00 off after a customer has spent \$10.00. (R. 58.) An Ala Wai Boat Rental coupon provides for a free ten minute boat ride. How valuable can that be? Another provides for 25% discount on boat rides on certain days. The Bargain Sales coupon provides for one free Benrus watch with the purchase of a Benrus watch of equal value. The Lippy Espinda coupon provides for a free chassis lubrication with the purchase of an oil change. The Ace Motors coupons provide for various amounts of free gasoline on the purchase of automobiles for over various prices. The King Street Car Wash coupons provide for discounts on car washes.³

Thus, many of the items mentioned were not free in the sense that the buyers were led to believe them to be. Also, the buyers were entitled to some of the other items without coupons.

³The Assistant United States Attorney who tried this case is no longer in this office. The original exhibits are in the office of Clerk of this Court. The writer of this brief had available a George's Shell Service card, several coupon books and a form of agreement with merchants, but could not compare them with those in evidence. From a conversation with said former Assistant United States Attorney, the writer believes that the statements as to what the card provided and as to the period it was good for are correct, that the various coupons mentioned are in evidence and contain the provisions mentioned, and that all the agreements mentioned provided that Customers Checkbook would pay all of the advertising costs on radio, television and in newspapers and did not provide that the telephone would be used.

In addition to wording the sales pitches to deceive, appellants knew that they were deceiving. Verna May Chung testified that the telephone girls were instructed to have appellant, Lemon, or Virginia handle complaints and that later they were instructed to leave the phones off the hook after they had finished calling the customers each day and later, when there were many complaints, to say, in pidgin language, "I am just the janitress and I don't understand." (R. 76, 77.)

From June 2, 1958 to June 17, 1958, 4208 items were mailed by appellants. (R. 119.)

Appellants complain that the trial Court erred in denying their motion for acquittal. In *Crawley v. United States* (1959), 4th Cir., 268 Fed. (2d) 808, the Court said at pages 811 and 812:

"The question is not whether the evidence forecloses all possibility of doubt in the mind of the court, but merely whether the evidence, construed most favorably for the prosecution, is such that a jury might find the defendant guilty beyond a reasonable doubt. *Bell v. United States*, 4 Cir., 185 F. 2d 302; *United States v. Brown*, 2 Cir., 236 F.2d 403; *Stoppelli v. United States*, 9 Cir., 183 F.2d 391. Judge Soper, speaking for this Court in the *Bell* case said of our duty of appraising the sufficiency of the evidence (185 F.2d 310):

"* * * That responsibility does not include a finding as to whether the defendant is guilty beyond a reasonable doubt. When a motion for a directed verdict of acquittal is made in a criminal case, the sole duty of the trial judge

is to determine whether there is substantial evidence which, taken in the light most favorable to the United States, tends to show that the defendant is guilty beyond a reasonable doubt. The possibility that a jury may have a reasonable doubt upon the evidence as to the guilt of the defendant is not the criterion which determines the action of the trial judge. The decision on that question is for the jury to make and the rule is the same whether the evidence is direct or circumstantial. . . .’ ”

It is apparent that the evidence adduced prior to the motion for acquittal meets the test. At the very least, it tended to show that the appellants were guilty beyond a reasonable doubt. It at least tended to show a scheme calculated to deceive and the payment by those deceived of money for something other than they were led to believe they were obtaining.

Antone Youn, owner of Tony's T.V. and Radio Service, testified for appellants. His coupon provided for a free TV service call, \$5.00 value. He testified that if he had a call from Kaneohe, he would charge \$5.00 in addition to the coupon. (R. 129.) It is obvious that Kaneohe is some distance from Honolulu.

Appellants' witness, Sam Price made some illuminating statements. He testified that “. . . in all these something for nothing deals, you never really get something for nothing. What it amounts to is a sales stimulant. You are going to get a certain number of customers that are not happy with it,” (R. 148), and “A lot of people are quite naive.” (R. 150.)

Appellants also complain that the trial Court erred in failing to rule that the evidence was insufficient to support a verdict of guilty. They argue that the technique used could not have deceived any except the most gullible. (Appellants' Opening Brief, p. 9.)

The law protects the gullible as well as the skeptical.

It is respectfully submitted that the evidence adduced prior to the motion for acquittal was sufficient to go to the jury and that the entire evidence was sufficient for the jury to find beyond a reasonable doubt that appellants were guilty of the offenses charged.

CONCLUSION.

It is respectfully submitted that the judgment should be affirmed.

Dated, Honolulu, Hawaii,
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